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THE WAR AND THE CONSTITUTION

THE most notable effect of the German attack on Poland in the sphere of constitutional law was the clarification of the long discussed issue of the possibility of the neutrality of the Dominions, when the British Crown had declared the existence of a state of war. The Dominion Governments had not been parties to the treaty of August, 1939, with Poland or the accord of 6th April, and there was clearly no direct international obligation upon them to afford aid to Poland. The attitude of Eire was made clear in the Dail by the Prime Minister on 2nd September; the government would observe neutrality as between the belligerents, though the sympathies of the major part of the people were definitely with one side. The way for neutrality had been prepared by the agreement with Britain of 1938,[1] which cancelled the British right to make use of Irish harbours and territory in case of war. This provision of the treaty of 1921 had been regarded in 1921 by Mr. Lloyd George and his colleagues as essential, but Mr. de Valera denounced it as negativing any right on the part of Eire to declare neutrality in a British war, since no foreign power was likely to admit the neutrality of a country whose territory was open to use by Britain as a base of operations. Mr. Chamberlain, as part of his policy of appeasement, sacrificed as unnecessary in the view of defence experts what had been declared essential in 1921. The position resulting from the attitude of Eire remains anomalous in so far as concerns the status of Irish nationals outside Eire. They are British subjects in the eyes of English law

[1] Cmd. 5728; 1 & 2 Geo. VI c. 25.

and of the law in force in the various territories of the Empire, and, strictly speaking, if they entered the armed forces of Germany they would be guilty of treason.

In the Commonwealth of Australia notification of the British declaration of war was followed forthwith by the issue of a Proclamation notifying the existence of a state of war with Germany. In New Zealand a like procedure was followed; in both cases Parliament met forthwith and the action of the ministry was approved without opposition. The view taken appears to have been that, in virtue of the common allegiance and the close relations between the Dominions and the United Kingdom in the conduct of foreign relations, a declaration of the existence of war by the British Crown should be followed as a matter of course by like action in the Dominions, the separate action attesting their autonomy as well as their solidarity of feeling. In the Union of South Africa, on the other hand, the right to remain neutral was taken for granted by the Premier. It appears in fact that in the crisis over Czechoslovakia in September, 1938, the Union Government had been agreed that, were war to break out over that state, the Union would remain neutral, though that decision had not been made public at the time. General Hertzog held that, on the principles then accepted, neutrality in the Polish war should be adopted, but he failed to convince his Cabinet as a whole, there being a majority of one against his proposal. He therefore on 4th September, placed it before the House of Assembly for decision. His project involved the maintenance of the existing relations with Germany and Britain, care being taken that the Union should respect (1) its obligations to Britain as regards the defence of the naval base at Simonstown; (2) any duties arising from membership of the League of Nations; and (3) any obligations which might arise from the free association of the Union with other members of the British Commonwealth of Nations. He contended that Herr Hitler's action in attacking Poland was a justifiable repudiation of the treaty of Versailles. The Union would gain nothing from entering the war, but the unity which had been growing up between speakers of English and of Afrikaans would be destroyed. General Smuts held that the Union had not to consider active participation in the war, for her resources would be needed for home defence, but whether she should treat Germany as a friendly country. The reservations of the Prime Minister would create an imperfect neutrality which Germany would be under no obligation to recognise. The action of Herr Hitler went far beyond the redress of grievances; it meant world domination, and in due course a demand for the surrender of South West Africa,

whose retention was vital for the Union. The position of General Smuts was upheld by 80 to 67 votes. The Prime Minister suggested a dissolution which the Governor General declined. The Premier resigned and was succeeded by General Smuts, who caused the immediate issue of a declaration of the existence of a state of war with Germany.

In Canada the government postponed action until it could obtain the approval of Parliament on 9th September to a policy of active aid to the United Kingdom. This was readily accorded, and a proclamation by the King, whose assent had been obtained by telegraph, was duly issued on the advice of the Dominion Privy Council on 10th September. The procedure had been rendered possible and simple under legislation of 1939 (3 Geo. VI, c. 22) enacted to allow the King when in Canada to exercise fully his royal functions as in assenting to Acts, ratifying treaties and so forth. The Minister of Justice defined carefully the position of the Dominion; it was theoretically very difficult, and practically impossible, for Canada to remain neutral when the King was at war. Even after the Statute of Westminster, 1931, Canada had left to the Imperial Parliament the power of constitutional legislation for the Dominion. There was a common allegiance, the Criminal Code assumed that Canada would not be neutral, the shipping legislation assumed alliance with Britain.

It is important to note that the Dominion Governments had no responsibility for the policy which led to the war. The pledge given on 31st March, 1939, to Poland was not shared in by them, and the formal treaty of August made no provision even for their right to adhere. The Governments had been fully informed throughout of the course of foreign policy, but information implied no obligation, and the progress of events at the end was so swift that no Dominion Cabinet was in a position to form a policy which it could offer for consideration as an alternative to that of the British Government. But the strength of the British case lay in the fact that the refusal of all delay by Germany, despite widespread appeals from neutral powers, proved beyond controversy that Germany was guilty of aggression.

In the United Kingdom itself the decision to go to war was duly approved by the Commons,[2] but it must be noted that the decision was arrived at without any mandate from the electorate. The appeal to that body by the ministry of 1935 was based on adherence to the policy of collective security and maintenance of the obligations of the Covenant of the League of Nations; but, while sanctions under the Covenant to assert the interests of

[2] On 3rd September there was not even a division; 351 H.C. Deb. 5 s. 291 ff.

Ethiopia were contemplated, the recourse to armed coercion was not contemplated, and in June, 1936, when the economic sanctions tried had failed of effect, the decision was taken to drop sanctions altogether rather than risk war. The attitude of the ministry at Munich in September, 1938, had been dominated by the determination to avoid war, and the Premier had announced peace with honour for our time as the boon brought back from that city. The League had not been consulted in any way regarding the fate of Czechoslovakia, and the subsequent promises of aid given in 1939 to Poland as to Turkey, Rumania, and Greece were not accorded under League auspices. The declaration of war against Germany thus could not be held covered by the mandate given in 1935, and must be justified by adopting the view that an electoral victory authorises the ministry to follow any line of policy, even if departing seriously from that announced by it when appealing for a mandate, which it believes to be made necessary in the vital interests of the public by emergent circumstances of external character. It is clear that this view limits very seriously the scope of the doctrine of mandate, for even in internal affairs it may be easy enough to represent that matters have suddenly assumed a gravity, which compels departure from an existing mandate, and does not allow time for the obtaining of a fresh lease of authority. More difficult still is the further question whether it is competent constitutionally for a Parliament, under circumstances such as those created by entry into war without a mandate, to extend its own life, thus depriving the electorate of the possibility of determining *ex post facto* whether war should have been undertaken, and of laying down under what conditions it desired that the conflict should be persisted in or peace offered.

In Canada the issue was early faced and disposed of. The Liberal Government had a commanding majority in the Commons and an adequate control of the Senate, and it would have been possible to pass resolutions through the two Houses requesting the extension by the Imperial Parliament of the life of the Dominion Parliament, which was due to expire in 1940, and which could not be continued by local Act. But, as criticism of the ministry had been expressed by the Provincial Legislature in Ontario on 18th January, 1940,[3] on the score of failure to carry on the contribution of the Dominion to the war with sufficient energy, the Prime Minister unexpectedly dissolved, securing a complete victory.

[3] The criticism had no constitutional validity, but was evoked by personal rivalry between the Provincial Premier and the Prime Minister of the Dominion.

Canada made no effort to eliminate party during the war by the formation of a coalition government, as would very probably have been possible. In the general election the leader of the Conservatives spoke in favour of a National Government, which he would construct if the electorate pronounced in his favour, but the idea appears to have had no power to attract voters. In the United Kingdom the Prime Minister was prepared to offer admission to the War Cabinet to the Labour Party, and to the ministry to the Liberal leader, but neither offer was deemed acceptable. The Labour party held that its work could best be done by remaining in opposition, though it agreed not to contest by-elections and has maintained that position to the length of disaffiliating the Pollok (Glasgow) Divisional party in April, because it insisted on contesting the seat. It was pointed out on 17th January by Mr. Attlee that in any case removals, which cannot be traced, the black-out, evacuation, and the departure of many voters on military service must seriously impair the value of the results of by-elections, and there is certainly force in this reasoning. But it is not very satisfactory to contemplate the carrying on of the war without the accession of authority derived from a general election;[4] once the normal term of the Commons has expired, it is open to those who oppose the national effort to declare that, while its extension of its own life may give it legal authority, it has ceased to have any moral claim on the obedience of the people. This difficulty will be specially serious if the course of the war is difficult, and grave sacrifices are imposed on the people. A further disadvantage arises as regards the making of peace. It will probably be felt imperative to have an election immediately before terms are fixed as in the Great War, and it can hardly be denied that such a time is apt to produce a House of Commons not well adapted to deal wisely with the issues. An election forthwith to secure a mandate for war and making of peace could therefore be suggested in January without absurdity; the difficulties regarding obtaining the votes of the forces were not serious at the beginning of the year, when so many men were still in Britain; but naturally the passing of time and the new energy brought into a war, which once seemed one of appeasement, by the German seizure of Denmark and Norway rendered the genuine difficulties of holding an election a formidable argument for inaction. In the Great War, of course, the circumstances in which the life of Parliament fell to be extended were such as to render the idea of a general election difficult to defend, and like

[4] On 17th October the Labour party indicated its readiness to accept a general election at the end of the war: no doubt it feared loss of strength in a war election.

conditions have been created by the attack on Holland and Belgium.

In the Union of South Africa the issue of a dissolution was hotly discussed. As noted above, after the defeat of General Hertzog in the House of Assembly, he suggested a dissolution, which the Governor General refused. His contention was that it was not for Parliament, but for the electorate, to decide so vital a question as the issue of war or peace, and that no serious injury would be inflicted if a dissolution took place forthwith. The Governor General's reasons for refusal were naturally not announced, but his attitude can be supported on two substantial grounds. Formally, the dissolution was not advised by the Cabinet for in it there was a majority of one against his policy. Now there is dispute in Britain regarding the right of the Prime Minister to advise a dissolution without securing Cabinet consent, and certainly such a right still remains without final acceptance as a rule of the constitution.[5] In the Dominions still less is there any tradition of the right of the Prime Minister to obtain a dissolution against the will of a majority of the Cabinet; if he desires to dissolve and the Governor is willing, the correct course is to reconstruct the Cabinet, so that it may give the desired advice.[6] Materially, the holding of an election in the state of feeling on both sides in the Union would have been the cause of much bitterness and contention, involving even the risk of civil war. The Governor General patently had the right to take this consideration into account. But it must be added that the policy of General Smuts expressly disavowed any intention to conscript troops to serve outside the Union; had such a policy been contemplated, the claim for a general election would patently have been overwhelming. This pledge has been loyally kept; though the service of troops outside South Africa—a term including much beyond the Union—is contemplated when necessary, the troops sent will all be volunteers. The same principle has been announced for Canada, for the Commonwealth, and for New Zealand; in Canada any other policy would have raised the racial issue and destroyed the unity of the country; in Australia compulsion was vetoed by Labour which objected to it even for home service; in New Zealand the Labour ministry holds that it can secure by voluntary means the men required.

As was expected, the outbreak of the war saw the establishment of a War Cabinet, but the body created departed in essentials from that brought into being by Mr. Lloyd George in 1916

[5] Keith, *The Constitution of England from Victoria to George VI*, i 176 f., 257 ff.
[6] Keith, *The Dominions as Sovereign States*, p. 355. This view is accepted by General Smuts, *Assembly Debates*, 9th April, 1940, p. 4613.

after he had ousted Mr. Asquith. The principle on which his Cabinet was based was the divorce of all its members except Mr. Bonar Law, as Chancellor of the Exchequer, from tenure of departmental office. The wise men were to plan victory, while Mr. Bonar Law protected them from intrusion,[7] or, more correctly, formed the essential link of connection with Parliament, and in doing so paved the way for his growing control of the Commons. Mr. Chamberlain's War Cabinet, on the contrary, as first constituted, included the essential departmental heads, the Chancellor of the Exchequor, the Foreign Secretary, the Minister for the Co-ordination of Defence, the heads of the three defence departments, and two ministers in effect without portfolio, Sir S. Hoare, as Lord Privy Seal, and Lord Hankey, whose former services as Secretary to the Cabinet and experience of the Great War, were held to justify his continuing to draw his pension while accepting the emoluments of a Cabinet Minister.[8] The Dominions Secretary was allowed access to the War Cabinet, so that he might be in a position to keep the Dominions fully in touch with decisions. But there was necessarily no proposal to add Dominion representatives to the Cabinet, unless and until the issue was raised by the Dominions.[9]

The only obvious criticism of the Cabinet was the presence in it of the Minister for the Co-ordination of Defence side by side with the heads of the departments. But patently it was out of the question to ignore the right of Mr. Churchill to share in the supreme direction of the war. Public opinion had forced the Prime Minister to offer him office once war was certain; his ministry would have been assailed violently in the Commons, had the offer not been made. There were also excellent reasons for holding that the heads of the departments should be able to discuss the problem of winning the war on a footing of equality in the War Cabinet rather than merely be summoned to advise without share in the final decision. For the Minister for the Co-ordination of Defence a special sphere of usefulness was devised in the new War Cabinet organisation, in which was merged the Committee of Imperial Defence with its committees and the committees of the peace-time Cabinet. The organisation involved five main groups, each comprising a main ministerial committee and other committees. Sir. S. Hoare presided over the Home Policy Committee, the Chancellor of the Exchequer over that on Economic Policy, the

[7] In fact the War Cabinet was constantly interviewing ministers, officials, and others.

[8] For criticism of his appointment see Mr. Dalton, February 7th, 1940; H.C. Deb. 5 s. 309ff.

[9] A visit by individual Dominion ministers was arranged in October, 1939.

Minister of Home Security presided over that on Civil Defence, the Minister for the Co-ordination of Defence over the Priority Committee and the Ministerial Committee on Military Co-ordination created in October, 1939. This body included the three heads of the defence departments with the chiefs of staff as advisers. It kept under constant review the main factors in the strategical situation and the progress of operations, and made recommendations to the Cabinet as to the general conduct of the war. The Chiefs of Staff Committee is served by the Joint Planning and Joint Intelligence Staffs, which are in continuous session; it reported as before to the War Cabinet, but its report might, if convenient, be referred to the Ministerial committee either before or after presentation to the Cabinet. The Minister for the Co-ordination of Defence dealt, in addition to his Committee work, with various matters relating to inter-service co-operation, in accordance with the essential feature of War Cabinet organisation that it should comprise a certain number of ministers able to devote their special attention to the special problems which arise from time to time.

The work of the Committee on Economic Policy,[10] which includes the ministers concerned with the various aspects of the subject, is to co-ordinate the working of departments in relation to the economic effort of the country as a whole. It also supervises the arrangements for Anglo-French economic co-operation. Lord Stamp, with the aid of other economists and a small expert staff, systematically advises this Committee, reviewing current economic plans and activities in order to propose ways of filling any gaps or remedies for any inconsistencies. He presides also over an inter-departmental committee of the permanent heads of the departments concerned. This organisation has raised much discussion and criticism by those who hold that the economic side of the effort of the country demands the presence in the War Cabinet of a minister specially charged with this question. But a motion in this sense by Mr. H. Morrison on 1st February, 1940, was resisted by the Prime Minister, who stressed the difficulty of fitting in the functions of the new minister with those of the Chancellor of the Exchequer. Sir John Simon insisted that the divorce of economics and finance was impossible, and he pointed out to Mr. Attlee that full consideration was already being given by the War Cabinet to the issues which he mentioned as demanding consideration—the allocation of resources between the war effort and civilian needs, the standard of living, and the division

[10] Mr. Chamberlain, House of Commons, 9th October, 1939; *The Times*, 27th January, 1940.

of man-power between various services. Mr. Chamberlain contended that the new minister would virtually supersede the Prime Minister, if he were to be able to dictate to the Chancellor of the Exchequer, the Ministers of Labour, Transport, and Agriculture, and apparently the ministers of the service departments as well, to which a Labour member added the apposite comment, "That would be a grand job for Winston," amid appreciative laughter. It must be admitted that the scheme suggested lacked clarity, though it remains difficult to hold that the Chancellor of the Exchequer can effectively deal with all the issues which fall upon his shoulders.

The ministry was increased by the addition of offices to deal with the special features of the war effort.[11] The Home Secretary was given the functions of Minister of Home Security; the Chancellor of the Duchy of Lancaster assumed the duties of Minister of Food; a new ministry of Economic Warfare[12] was brought into being, and a Ministry of Information was placed under Lord Macmillan, who resigned his office of Lord of Appeal in Ordinary. The experiment of placing this ministry under a minister not in the Commons was from the first open to grave doubt, and in fact the plan did not work. It was essential, if the ministry was to be able to defend itself, that its head should be in the Commons, and on 5th January, 1940, Lord Macmillan's resignation opened the way to the appointment of Sir John Reith. A Ministry of Shipping, loudly demanded in the Commons, was finally conceded, but the selection of a minister, Sir John Gilmour, who had been dropped in the Cabinet reconstruction of 1935, proved somewhat unpopular, though the minister was making a favourable impression prior to his sudden death.

An interesting illustration of the supremacy of the Prime Minister in the Cabinet was afforded by the resignation of Mr. Hore-Belisha, Secretary of State for War, announced on 5th January. The cause of his resignation was not revealed either by him or the Prime Minister, who simply declared his conviction that Mr. Hore-Belisha's services would in his opinion be better employed at the Board of Trade. Mr. Hore-Belisha declined the offer of this office on the unanswerable ground that his removal from his former office would render him unable to serve with sufficient effect at the Board. It was made clear that no case existed of military intrigues against the Secretary of State, who, however, had unquestionably made many enemies by the ruthless manner in which he had reconstituted the Army Council and

[11] Ministers of the Crown (Emergency Appointments) Act, 1939.

[12] It had similar functions to those of the Ministry of Blockade from 1916; 351 H.C. Deb. 5 s. 1235 ff.

advanced younger men to high office. An assurance was readily given that there was no idea of reversing the democratic reforms in the army, including the new rule that officers for the armies in process of formation would in future be selected by merit from those who had served in the ranks. The vacant post was filled by the promotion of Mr. Oliver Stanley, whose post at the Board of Trade was conferred on Sir Andrew Duncan, who, like Sir John Reith, was not a member of the Commons, but for whom a seat was forthwith found. It was pointed out that in making this selection the Premier was acting in accord with the precedent set by Mr. Lloyd George in appointing experts rather than politicians to certain offices during the Great War. On the other hand, when the Premier yielded to the demand for the appointment of a Minister of Supply in June, 1939, he did not attempt to find an expert, conferring the post on a member of the Commons of some standing, with legal experience, especially in the field of commercial law.

On 3rd April, 1940, a still more remarkable instance occurred of the power of the Prime Minister to order his Cabinet. On 29th March the resignation of Lord Chatfield of the office of Minister for the Co-ordination of Defence was tendered. He held that, of importance in peace, the position became anomalous in war, because the power to co-ordinate and make decisions passed automatically into the hands of the Prime Minister. In fact his appointment to the War Cabinet had always been anomalous, because in the discussion of Munich[13] he insisted on the inability of Britain and France to defeat Germany on land, and the uselessness of using the fleet to starve her out, so that his undertaking to aid in a war which reproduced in even more marked form the difficulties regarding Czechoslovakia seemed strange. His resignation left Mr. Churchill as the senior service member to preside over the Committee of Service Ministers, now reinforced by adding the Minister of Supply. Later it was announced that on occasion the Prime Minister would himself, as suggested by Mr. Churchill, preside over that Committee. This arrangement would have been interesting; it must greatly have increased the strength of the Committee, for, if the Prime Minister concurred with the Committee, there could patently be no room for opposition in the Cabinet as a whole.

No other change was made in the composition of the Cabinet, the Prime Minister declining to accept the validity of the clamour for a small Cabinet, but an unexplained reshuffle of ministers was made. Sir S. Hoare handed over the Privy Seal to Sir Kingsley Wood, and became Secretary of State for Air, a rôle which was

[13] 110 H. L. Deb. 5 s. 1359 ff.

familiar to him. It was explained that, as Chairman of the Home Policy Committee and of the Food Policy Committee, Sir K. Wood on behalf of the War Cabinet would concert and direct the work of the departments concerned, thus furthering the Prime Minister's desire to secure full co-ordination of the work of departments with related functions, and to keep the War Cabinet informed on all questions of major importance arising in the course of departmental work. The Economic Policy and Civil Defence Committees were left as before. Another man of business experience was introduced in the shape of Lord Woolton as Minister of Food, while Sir K. Wood was responsible in the Commons for food policy as a whole. Mr. W. S. Morrison, who thus lost the Ministry of Food, was rewarded with the Postmaster-General's office, vacated for him by Major G. C. Tryon, who took over the Chancellorship of the Duchy of Lancaster from Mr. Morrison, and was consoled with a peerage. It was made clear that the changes made were not to affect the emoluments of ministers concerned. Still more curious was the exchange of offices between the President of the Board of Education and the First Commissioner of Works.

A substantial reverse in Norway, indicating lack of foresight and failure to co-ordinate naval, air, and military endeavour, led to an acrimonious debate in the Commons on 7th and 8th May. Despite an able defence by Mr. Churchill, who insisted on the full responsibility of all members of the War Cabinet for the failure, and an appeal to his "friends" by the Prime Minister, which evoked some criticism from Mr. Lloyd George,[14] the ministry avoided defeat by no more than 281 to 200 votes, and the minority included over forty of its normal supporters, while many abstained. A reconstruction of the ministry was demanded even by a number of supporters of the Prime Minister, but the Labour party maintained its refusal to serve under Mr. Chamberlain. The solution was then found of securing a new ministry under Mr. Churchill, Mr. Chamberlain resigning office, when the King, doubtless on his suggestion, commissioned Mr. Churchill to form a truly National ministry to replace the existing government, which rested essentially on the support of the Conservative party.

The new War Cabinet of five members has as its most important feature the assumption by the Prime Minister of a new Ministry of Defence. He will, of course, be advised by the service ministries, which he placed under new heads, Mr. Alexander at the Admiralty, representing Labour, Sir A. Sinclair, Liberal leader, at the Air Ministry, and Mr. Eden at the War Office. When he

[14] 360 H.C. Deb. 5 s. 1285.

and they with the Chiefs of Staff are in accord, patently there can be no chance of serious opposition in the Cabinet, and much business, it may be presumed, will not be discussed in Cabinet at all, but merely intimated to it. The Prime Minister will thus be far more completely in control of the actual conduct of the war than was Mr. Lloyd George in his Cabinet or Mr. Chamberlain. He has, of course, far greater experience of matters concerning war than either of these leaders. The retention of Lord Halifax as Foreign Secretary emphasises the importance of foreign policy to the War Cabinet, and the desirability of avoiding placing it too exclusively in the hands of the Prime Minister, as was the case under Mr. Lloyd George. Lord Halifax's share in responsibility for all the major errors of British foreign policy, which have brought about the war, rendered his retention doubtful in some opinions. But it may have been hoped that the services which he had rendered to Signor Mussolini, by restraining British and French opposition to the destruction of the Spanish Republic, by procuring the acquiescence of the League in the recognition of the King of Italy as Emperor of Ethiopia, and by recognition of the Albanian conquest, would enable him to influence the Duce to remain non-belligerent. Mr. Chamberlain's retention in the ministry as President of the Council, but not as deputy leader of the Commons, a duty undertaken by Mr. Attlee, was frankly anomalous, and some surprise was felt that Labour was willing to accept him as a colleague, a step suggesting that their former criticisms were unjustified, and in some degree insincere. But it was no doubt felt by Mr. Churchill that, by including Mr. Chamberlain in the ministry and by asking him to retain his leadership of the Conservative party, he would secure his ministry from hostility in Conservative ranks which might hamper its war efforts. It must be remembered that it has not been easy for Conservatives, who applauded every surrender by Britain of the interests of other countries in order to conciliate Herr Hitler and Signor Mussolini, to convert themselves into devotees of war, and that the obvious failure of the late ministry to make anything like adequate use of British man-power and financial and economic resources was largely due to the necessity of not alienating support for war measures. The discrepancy between Parliamentary strength and the composition of the new Cabinet is a matter always seriously to be borne in mind and the difficulties of the situation must not be ignored, though they will no doubt take some time to become obvious.

Like Mr. Chamberlain, Mr. Attlee, as Lord Privy Seal, and Mr. Greenwood, as Minister without Portfolio, have no departmental duties to prevent complete devotion to the work of winning

the war.[15] The omission of the Chancellor of the Exchequer from the Cabinet is an innovation; Sir A. Chamberlain energetically declined the offer of that office from Mr. Lloyd George if not accompanied by a Cabinet seat, and *prima facie* the presence in the Cabinet of the essential authority on finance is desirable. It must, on the other hand, be remembered that it was argued that there should be a minister for economic planning to present these issues in the Cabinet, and to balance the orthodox financial outlook of the Chancellor, and it may be assumed that it is intended that the Cabinet itself, with the aid of the ministers concerned, including the Chancellor, will take up the work which would have been the task of the proposed minister and the Chancellor. Mr. Chamberlain and Mr. Churchill alike have had experience as Chancellor, and the former will obviously be able to co-operate in the cabinet with the representatives of Labour, which is also now in possession of the Ministries of Supply and Labour and National Service in the hands of Mr. Morrison and Mr. Bevin. The introduction of the latter from outside Parliament is noteworthy as a realisation that the leisurely methods of dealing with the essential work of inducing wholehearted use of all available man- and woman-power in operation under the late ministry are utterly insufficient to cope with the situation brought about by the driving power and intelligence of the Führer. The spirit of the Ministry of Information's *Assurance of Victory* is not one to win a war.

The composition of the rest of the ministry was obviously dictated by complex reasons, the necessity to reward personal supporters,[16] to conciliate important Conservatives already in office, and to include the leading figures in the Labour and Liberal parties. Two new ministries must be noted, a Minister for Aircraft Production, for which office the driving power of Lord Beaverbrook has been enlisted, and a Secretary for Petroleum, the work being taken away from the Secretary for Mines. Labour has received a due share of vital offices, for the Ministry of Economic Warfare has been given to Dr. H. Dalton who had been a vigilant critic, and has expressed his strong opposition to permitting obsolete doctrines of international law to hamper British action. His predecessor had already asked Signor Mussolini to make it clear where he stood, although in fact it was only too plain that

[15] The Labour Party, following the advice of the executive, gave decisive approval of participation in the government.

[16] Mr. Amery at the India Office, Lord Lloyd at the Colonial Office, and Mr. Duff Cooper at the Ministry of Information are clear cases. The experts, Sir A. Duncan and Lord Woolton, were retained, Sir J. Reith became Minister of Transport, Lord Hankey Chancellor of the Duchy of Lancaster, and Lord Tryon First Commissioner of Works. Sir Kingsley Wood became Chancellor of the Exchequer on the new basis, Sir J. Simon accepting the Lord Chancellorship.

the Duce was waiting for the most advantageous moment to strike, in the meantime exercising his non-belligerent position as a means of hampering to the utmost the allied effort to prevent Germany acquiring vital material for war supplies by the exercise of contraband control.

One difficulty which hampered the effort to form a National Government at the beginning of the war was countered by giving an assurance that the heads of all three parties would be consulted on the general policy of the ministry and on peace aims. The Liberal leader, though not in the War Cabinet, is thus assured of a due share for his party in discussion of essential issues, as also is Mr. Chamberlain, even if for any reason he ceased to be in the Cabinet.

The coalition of parties has created a unique position as regards the working of the Commons. Hitherto there has always been some body which could be treated formally as an opposition, but patently the tiny Independent Labour Party group of three members could not be accorded this status, nor could its leader be deemed entitled to the salary of £2,000 a year provided under the Ministers of the Crown Act, 1937. The Speaker ruled further on 21st May that there was no opposition in the accepted sense of the word, namely a party in opposition to the Government from which an alternative government could be formed. He held therefore that on the front opposition bench ex-ministers might sit as customary, but that back benchers should be eligible to be invited to sit there, as had been the custom of the Labour Party for some time. He declined to commit himself as to the procedure for the selection of topics to be discussed on supply days pending further developments. Mr. Maxton pointed out that it would not be right to give a strategic position to an opposition composed of ex-ministers who were now in full accord with the governmental policy. In fact, of course, the emergence of an opposition must under British conditions be only a matter of a comparatively brief time, and the Speaker made it clear that he would see that different opinions were given proper opportunities of expression. There is no doubt in any quarter that Parliament can operate smoothly and successfully only on the basis of the existence of an opposition. In any case some Labour members will claim the right to oppose the ministry if they think fit on industrial and economic issues.

One problem has defied solution from first to last, the giving of proper information to the public[17] regarding the progress of the

[17] The opposition leaders were kept in touch by a system of liaison with the Defence Departments, Foreign Office, and Prime Minister.

war, so as to aid not merely the British public, but neutrals, to appreciate the magnitude of the tasks of the allies and their success in achieving them. The difficulty arises, in the view of many critics from the fact that the service departments control absolutely the issue of news affecting the forces under them, and that they are free from any control by the Minister of Information, though he is appointed *ex hypothesi* by reason of his flair for publicity.[18] It appears clear[19] that Britain has lost influence in neutral countries as a result of the natural reticence of defence departments which makes them decide, when any item of news is concerned, that silence is golden lest by some chance its publication may reveal facts to the enemy. The counter-argument that there is importance in counteracting the ceaseless propaganda of the German government, often backed up by the propaganda of Signor Mussolini and his press, is held not to weigh sufficiently with the service ministries, which naturally rely on the force lay opinion must allow to their normal answer to criticism, that it would never do to jeopardise valuable lives. In the circumstances it must be admitted that the ministry is of circumscribed value, contrasting very clearly with the German Ministry of National Enlightenment and Propaganda. Its own efforts at influencing foreign opinion or home opinion have elicited more criticism than enthusiasm.

As was inevitable, the war compelled large additions to the civil service, and the new appointees could not be selected with the normal care nor in the normal manner. Many complaints were naturally directed at the stupidity with which high officials found places for relatives or friends,[20] but still more serious was the decision to drop competitive examination as a means of selecting recruits. The excuse given, the danger of air-raids interfering with examinations, seemed absurd in view of the fact that the Universities were able to continue examinations, and in April promise of reconsideration was made. The Great War led to prolonged cessation of examinations, the recurrence of which it is patently desirable, in the interest of the public service, to avoid. A modification in the rule against the employment of married

[18] Broadcasting had been placed in September, 1939, under the control of the Minister of Information in place of the Postmaster General, and the Board made virtually bureaucratic; 351 H.C. Deb. 5 s. 1490 ff., a change not at all welcome.

[19] E.g. the failure to counter photographic propaganda of German supremacy in Norway; *The Times*, 18th April, 1940. British photos appeared on 22nd April only.

[20] Mr. E. L. Chatfield's appointment to the Admiralty was severely criticised in Labour circles, and Mr. Churchill's explanation on 31st January was too ingenious. On 11th December, 1939, the Civil Service Clerical Association stated that the War Office had agreed that wives of Civil Servants should be employed only in exceptional circumstances and not in the same establishments as their husbands.

women was made; women on marriage must resign but could be re-engaged on a temporary basis for the duration of the war.

An inevitable result of the declaration of war was the adoption of the system of compulsory service in the armed forces for all male British subjects resident in Great Britain from age 18 to age 41. The principle had already been adopted in the Military Training Act, 1939, which provided for such training for six months of youths between 20 and 21, and that measure had not elicited any very strong objection, despite the complete departure from tradition, and the absence of any mandate. The acceptance of the National Service (Armed Forces) Act was motivated by patent necessity; the grave difficulties of the voluntary system in the Great War precluded serious objection, and it was pointed out that under general liability the Government would be able to reserve those employed in occupations in which their services possessed national value, thus avoiding the confusion and waste of man-power in 1914–18 when, for instance, miners enlisted in such numbers as to create grave embarrassment and to compel their being taken out of the armies. Serious difficulties arose in dealing with conscientious objectors to military service. The argument that such objections should not be recognised by the state was naturally not faced by the ministry, which saw the great practical advantage of eliminating the issue by giving objectors the chance of establishing their position before local and appellate tribunals so constituted as to command general respect. These bodies have certainly in the main played well a very difficult part, for it is a task of enormous difficulty to decide what reasons are sufficient to justify a man enjoying the protection of the state and often gaining immediate pecuniary or other advantage by being allowed to remain in work he likes, when his contemporaries are compelled to risk their lives, to suffer serious pecuniary and other loss, and to part from their families. Especially curious is the position adopted that a conscientious objector is not *ipso facto* incapable of remaining in the service of a government department, even one concerned with the conduct of the war.[21]

A further difficulty is raised by the fact that many British subjects are resident in Great Britain only temporarily. The solution adopted is to exempt from obligation to serve any British subject, not ordinarily resident, who is under the legislation of a Dominion a national or citizen thereof, or who was born or is domiciled in any part of the King's dominions outside Great

[21] *Cf.* Sir J. Simon, House of Commons, 21st November, 1939. In the main objectors have made out rather feeble cases.

Britain, or in a British protectorate, or a mandated territory, or any other country under His Majesty's protection or suzerainty, the last phrase covering no doubt a territory under condominium, such as the New Hebrides or the Sudan. All these persons become liable to service if ordinarily resident, and residence is normally an indication of ordinary residence, unless it has been for less than two years, or is for educational purposes, or the circumstances attending it show that it is temporary.

The elaborate character of the exemptions is explained largely by the desire to minimise difficulty with Eire. Mr. de Valera sought, when the Military Training Bill was brought forward, to establish the principle that Irish nationals were aliens in Britain and thus exempt from service. It was impossible for the British Government to accept this doctrine without negativing the existing principle of law, under which a subject of the King in a state linked to Britain by a personal union is also a British subject,[22] or admitting that the King no longer had sovereignty in Ireland and that Eire was no longer a member of the Commonwealth. But the concessions made were calculated to make it plain that none would be affected save those who could definitely be said to have chosen Britain as the place of their livelihood, so that it was proper and right for them to take up arms in its defence. Moreover, no difficulties were raised to the departure from Britain of any Irish nationals who desired to avoid service.

An important argument adduced by Mr. de Valera had to be rejected. It was suggested that, as the legislation of Eire denied that Irish nationals were British subjects, and claimed that they should outside Eire be regarded as such nationals only,[23] Britain should accept as valid the Irish claim. The answer plainly was that there is no principle of international law which compels any country to accept the declarations of another regarding nationality. Those who would be affected by the legislation were all persons who were born British subjects under the British Nationality and Status of Aliens Act, 1914, and from their character as British subjects no act of Eire had power to derogate within the United Kingdom, for the power to repeal British Acts extending to Eire given by the Statute of Westminster, 1931, s. 2, refers to such Acts only in so far as they are part of the law of Eire.

Another contention was based on two doctrines denied with justice by Britain. The International Protocol relating to Military

[22] *Isaacson* v. *Durant* (1886), 17 Q.B.D. 54.

[23] *Cf.* Keith, *Letters on Imperial Relations*, 1916–35, pp. 150 ff.; *Current Imperial and International Problems*, 1935–36, pp. 35 f., 47 ff.

Obligations in certain cases of Double Nationality, concluded at The Hague in 1930, provides by Art. 2 that, if a person possesses the nationality of two or more states, and, under the law of any one of these states has the right, on attaining his majority, to renounce or decline the nationality of that state, he shall be exempt from military service in such state during his minority. When the Military Training Act alone was in existence, the application of this clause would, it was held, exempt wholly from training Irish nationals, as the period of training fell during minority. The wider obligation of the National Service (Armed Forces) Act naturally would not be covered for any but minors, but, even in this limited sense, the argument put forward by Mr. de Valera was untenable. Not only had the British Government consistently held,[24] with the sanction of the Imperial Conference of 1926 at which the Irish Free State was represented,[25] that the terms of treaties concluded under League auspices did not apply to parts of the Commonwealth in their mutual relations, but the law of the United Kingdom contained no provision under which a British subject may on attaining majority renounce British nationality in favour of Dominion nationality.

Mr. de Valera, however, in addition to securing exemption for all Irish nationals not ordinarily resident in Great Britain, secured a marked success in preventing the extension of the obligation to Northern Ireland. The British Government in the original form of the Military Training Act had proposed to take power to extend the Act to that territory as was naturally to be expected. Mr. de Valera's objections were reinforced by the protests of Irish nationals in Northern Ireland and threats of hostile action, and it was held not to be worthwhile enforcing training. The adoption of the same principle when the issue assumed the wider form of war service was, no doubt, natural, as it evaded difficulties. But it is clearly impossible to regard any territory as an integral part of the United Kingdom, if its people are not prepared to share equally with those of Great Britain in national defence, and the success of Mr. de Valera's intervention was noted with satisfaction in Eire, as indicating a first step to the transfer of Northern Ireland to the control of Eire. The anomaly of the position of the territory has been accentuated by the decision of the island legislatures in Jersey and Guernsey to adopt for the period of the war compulsory service. No more striking example can be given of the desire of the British Government to respect local autonomy than the fact that Imperial

[24] Keith, *Speeches and Documents on the British Dominions*, pp. 347 f.
[25] *Ibid.*, p. 382.

legislation was not adopted to impose service. It must be added that, having regard to the limited legislative activity of the islands, the leaving to their legislatures of this issue may be regarded as over respectful of local autonomy, a fact which in no wise diminishes regard for their decision. It must be remembered that, as in the Great War, the islands have been left to decide for themselves the extent of any pecuniary contribution to be made towards the costs of the war, and that unquestionably their people will escape in substantial measure the grave burdens imposed on those of the United Kingdom.[26]*

[26] The legislature of the Isle of Man asked for the application of the Act, which was duly applied by Order in Council, 27th October, 1939.

A. Berriedale Keith.

(To be concluded)

* The first part of this article covers the period to the formation of Mr. Churchill's administration in the middle of May, 1940. We hope that the concluding portion, which will discuss the Defence Regulations, will be brought down to the end of July.—Editor.

THE THREE CERTAINTIES

THE requirement of three "certainties" for the effectual declaration of a trust, as it is found in modern books, goes back to some words of Lord Langdale in 1840,[1] although the idea lying behind it is no doubt practically coeval with the law of trusts. The three certainties are as follows.

(1) *Certainty of intention.* This certainty has always been required in theory, although some of the older cases on precatory trusts seem to our eyes to be over-confident of what the settlor's intention was.

(2) *Certainty of subject-matter (property).* This phrase conceals an ambiguity, of which more hereafter.

(3) *Certainty of beneficiaries (in the case of private trusts) or of objects (in the case of non-charitable "purpose" trusts without human beneficiaries—i.e. trusts of imperfect obligation).* This requirement does not apply to charitable trusts if there is a general charitable intention.

What is a sufficiently certain beneficiary or object is frequently a matter of very great difficulty. It is clear that if the possible beneficiaries or objects are marked out with some degree of definiteness, uncertainty as between two or more of them may be cured by a discretion given to the trustee.[2] Thus a discretion given to a trustee to distribute property among Liberal associations in the United Kingdom,[3] or to further foxhunting,[4] is good as a trust of imperfect obligation.

On the other hand if no beneficiaries or objects at all are indicated, save in very general language, the fact that a discretion is given to the trustee will not save the gift, and there will be a resulting trust. This was laid down in the much-discussed case of *Morice* v. *Bishop of Durham* (1805),[5] where a bequest to the Bishop for "such objects of benevolence and liberality as [he] in his own discretion shall most approve of" was frustrated by Lord Eldon, even though the bequest was of the corpus of the property and the Bishop was willing to make the distribution. The line

[1] *Knight* v. *K.* (1840), 3 Beav. 148 at 173. A fourth requisite has sometimes been suggested, namely that the manner in which the trust is to be performed must be certain (*Reeves* v. *Baker* (1854), 18 Beav. 372; Farwell, *Powers*, 3rd ed., 541), or that the trust must be possible of execution by the trustees (Hanbury, *Modern Equity*, 2nd ed., 132). But it seems that in practice these rules are usually reducible to one or the other of the first three.

[2] Cp. the American *Restatement*, Trusts, ss. 120, 121, 124.

[3] *Re Ogden, Brydon* v. *Samuel*, [1933] Ch. 678.

[4] *Re Thompson, Public Trustee* v. *Lloyd*, [1934] Ch. 342.

[5] 10 Ves. 522, affg. 9 Ves. 399. See note in (1935) 48 H.L.R. at 1164–5, and *Restatement*, ss. 122, 123, 417. The Restatement does not explain why the beneficiary is not "definitely ascertainable" within s. 112, but the lack of logic is the result rather of the law than of the compilers of the Restatement.

between this and the foxhunting case is obviously very fine. A similar principle to that in *Morice* v. *Bishop of Durham* is indicated by the numerous cases on gifts for "charitable or public," "charitable or philanthropic," "charitable or patriotic" etc., purposes, where the word "or" (or sometimes "and") is read disjunctively.

The rule just stated is sometimes expressed by saying that a testator may not leave some one else (i.e. his executor or trustee) to make his will for him, except in the case of charitable trusts.[6] Yet a testator may clearly leave a third party to make his will for him, for he may confer upon a third party a general power of appointment, which is perfectly valid. Why a similar power may not be conferred upon the trustee himself is not at all clear. Four arguments may conceivably be advanced for the distinction, but not one of them carries much conviction. In the first place, it may be said that the court cannot administer a discretionary trust for uncertain objects if the trustee fails to act. This was in fact the ground taken in *Morice* v. *Bishop of Durham*. But this objection is surely premature if the trustee is willing to act, as he almost invariably is. As Wood, V.-C., pertinently observed in *Buckle* v. *Bristow* (1864), "it might at first sight appear reasonable to say, 'They have their lifetime to appoint it to others, if they do not appoint it to themselves, and therefore wait till you see if that discretion is exercised.' "[7] Second, it may be said that *Morice* v. *Bishop of Durham* concerns a discretionary trust for *purposes*; a general power of appointment concerns a trust for *human beings*. But in other cases, such as *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875)[8] a discretionary trust for indefinite *persons* has equally been held to fail. The third possible argument is that a trustee cannot exercise his discretion in his own favour; whereas the donee of a general power can. But it was held in *Re Park, Public Trustee* v. *Armstrong* (1932),[9] that a power, otherwise general, was valid even though the donee was expressly debarred from appointing to himself. If these three arguments are rejected, the only other imaginable reason for the difference seems to be that the trust property is vested in the trustee; not so in the donee of a power. But why this should give rise to the consequence under discussion is not easy to see. However, it is perhaps

[6] *Grimond* v. *G.*, [1905] A.C. 124 at 126; *Houston* v. *Burns*, [1918] A.C. 337 at 342–3.

[7] 10 Jur. (N.S.) 1095. But he went on to hold that in consequence of *Morice* v. *Bishop of Durham*, that was not the law.

[8] L.R. 6 P.C. 381; cp. *Vezey* v. *Jamson* (1822), 1 Sim. & St. 69.

[9] [1932] 1 Ch. 580. (Underhill, *Trusts*, 9th ed., 23, wrongly states that the power was conferred upon the trustee; in fact it appears from Clauson, J.'s judgment that had the power been conferred upon the trustee it would have been bad.

profitless to inquire into the reason underlying the contradictory rules, when the rules themselves are settled too clearly to admit of doubt.

Effect of absence of one or more of the certainties. The divergent views on this topic expressed in the text-books have been a standing source of difficulty to students for many years past, and it will be well to begin by summarising them.[10]

All writers agree that if there is uncertainty of intention, standing alone, no trust is created and the person in possession of the legal estate (or of the equitable estate if the trust is alleged to have been created out of that) keeps it beneficially.

For the second certainty there is a conflict of opinion. Most writers (e.g. Snell, Underhill and Keeton) think that uncertainty of subject-matter is the same as uncertainty of intention. Strahan, on the other hand, thinks that a trust is constituted but that is void for uncertainty, so that (if the property has been conveyed to trustees) there is a resulting trust. Yet later on he seems to contradict himself by saying that "no property is affected by the trust, the intention of the intended settlor failing to operate."

If there is uncertainty of objects, standing alone, all agree that there is a resulting trust.[11]

As to the effect of a combination of uncertainties, Strahan implies that the effect of absence of the first certainty is paramount, and Professor Keeton implies that the absence of either the first or the second certainty will render immaterial the absence of the third.

So much for what the text-books have to say. A very small amount of consideration will show that the difficulty over the second certainty springs from a double confusion. In the first place, none of these writers properly discriminates between uncertainty as to the trust property and uncertainty as to the beneficial interest. And in the second place, uncertainty as to the beneficial interest may itself take two forms, which will be mentioned in a moment. In order to enlarge upon these two distinctions, I propose to draw up a suggested table of the effects of uncertainty that shall take account of both of them.

(1) Where it is uncertain what property is intended to be

[10] The relevant passages are: Keeton, *Trusts*, 2nd ed., 73–83; Snell, *Equity*, 22nd ed., 80–3; Strahan, *Digest of Equity*, 6th ed., 76–80; Underhill, *Trusts*, 9th ed., 17–24.

[11] Strahan and Underhill class under this heading "uncertainty as to the way in which the property is to be applied," and Keeton seems to mean the same thing by including uncertainty as to the interests taken by the beneficiaries. Yet it seems to be clear from the illustrations given by each of these writers in their treatment of the second certainty, and from their view of the effect of its absence, that in their opinion the second certainty, also, covers uncertainty as to beneficial interest.

affected by a declaration of trust, or what property is intended to be conveyed to trustees, it is evident that no property (legal or equitable) passes and the purported settlor is therefore never divested of his interest. One illustration of this given in the *Restatement* is where A declares himself a trustee of "the bulk of my securities" for B[12]. It would be the same if A purported to make a transfer of "the bulk of my securities" to a trustee for B. In either case, where this uncertainty is present it kills the trust at the start, and the existence of the other two uncertainties is immaterial.

This may have been the idea in the mind of Underhill (*Trusts*, 23–4), but his words are not at all clear, and the illustrations of "uncertainty as to the property" that he has just been giving are really illustrations of uncertainty as to beneficial interest.

(2) Where the property intended to be affected is certain, then—

(*a*) If there is uncertainty of intention, the person in possession of the alleged trust estate keeps it beneficially. The fact that there is also uncertainty as to beneficial interests or beneficiaries is immaterial. The rule is illustrated by the quaintly-worded disposition in *Curtis* v. *Rippon* (1820),[13] well known to all students of Snell. There the testator left property to his wife "trusting that she will, in fear of God and in love to the children committed to her care, make such use of it as shall be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." Leach, V.-C., held that the wife was absolutely entitled and that no trust was created for the children, "there being no ascertained part of it provided for the children, and the wife being at liberty at her pleasure to diminish the capital either for the Church or the poor; that the plain intention of the testator was to leave the children dependent on the wife."

(*b*) If the intention is certain, the question whether it will be thwarted or not depends upon the presence or absence of the other certainties. The first two cases now to be given are variants of "uncertainty as to beneficial interest," which, as already remarked, are not properly distinguished in the text-books. It will be seen to be immaterial whether or not there is also present the third uncertainty. The third case represents the third uncertainty standing alone.

[12] See s. 76. With us it is sufficient if there is a specifically enforceable contract to create a trust of unascertained property (e.g. an expectancy), and the property subsequently becomes ascertained: *Re Lind, Industrials Finance Syndicate Ltd.* v. *Lind*, [1915] 2 Ch. 345. But this is not recognised in the *Restatement*: see s. 76, Comment (*g*), and s. 26, Comment (*m*).

[13] 5 Madd. 434; and cp. Lewin, *Trusts*, 14th ed., 86.

(i) If beneficial interests are given to two or more beneficiaries, in respect of subject-matter that in the aggregate is certain, but the proportion that each is to take is uncertain, there is naturally a resulting trust. This was probably the rule in the mind of Strahan. It is exemplified in the law reports by *Boyce* v. *Boyce* (1849),[14] where the testator devised all his houses in trust to convey one of them, which his daughter Maria should think proper to choose, to her and her heirs, and to convey all the other of them to his daughter Charlotte in fee. Maria died in the testator's lifetime, and consequently without having chosen any of the houses. Charlotte survived the testator, but it was held that the gift to her nevertheless failed. In this particular case a more reasonable result might have been reached by holding that the gift to Charlotte was of all the houses save such one, if any, as Maria might choose. Perhaps a less controversial illustration of the rule, therefore, is *Re Moore, Prior* v. *Moore* (1901),[15] where a purpose trust was to end at an uncertain and unascertainable time; it was held that the trust failed. In effect the case is one of uncertainty as to successive interests.

It is hardly necessary to point out that the extent of the interest of the object or beneficiary need not be definite at the time of the creation of the trust if it is definitely ascertainable within the perpetuity period.[16] Thus failure for this uncertainty can be avoided by giving a discretion to the trustees to apportion between the beneficiaries within the perpetuity period. Can it be avoided if, although the trustees are not given a discretion, the beneficiaries, being definite persons who are *sui juris* and together absolutely entitled apart from the uncertainly, elect to apportion the property among themselves in a definite manner? It may seem reasonable to allow them to do this, and an analogy may perhaps be found in the rule that the beneficiaries under a discretionary trust may combine to put an end to the trust.[17] In both cases the beneficiaries may be regarded as collectively entitled to the whole of the property, even though individually they have no right to any part of it.

It makes no difference to the working of the rule that the beneficiaries, or some of them, also are uncertain. Thus if property is given to trustees on trust "as to the bulk" for A, and "as to the rest" for "public purposes," there is clearly

[14] 16 Sim. 476.
[15] [1901] 1 Ch. 936.
[16] Cp. *Restatement*, s. 129.
[17] *Re Smith*, [1928] Ch. 915.

as much a resulting trust as it "the rest" were given to B. Only in this case there is no possibility of saving the gift by the collective action of the beneficiaries.

The rule is of course confined to uncertainty of the extent of the beneficial interest. If the only uncertainty is in a condition subsequent attached to the beneficial interest, the condition is struck out and the beneficial interest stands.[18]

(ii) If a beneficial interest in respect of certain (i.e. definite) subject-matter is given to A *absolutely*, subject to a beneficial interest in respect of an uncertain part of it in favour of B, it seems that A takes the beneficial interest in the whole absolutely. This is evidently what Snell understood by "uncertainty of subject-matter," and, as he pointed out, the effect is similar to the effect of uncertainty of intention. Thus there is a line of cases to show that if A is given property absolutely, and "what remains at his death" is given to B, B takes nothing. It is true that, as the Privy Council pointed out in *Mussoorie Bank Ltd.* v. *Raynor* (1882),[19] the uncertainty of the property in such a case has "a reflex action" upon the words purporting to create the trusts, and throws doubt upon the intention of the settlor. Nevertheless it seems that there is a positive rule that, irrespective of intention, the gift over is inconsistent with the previous absolute gift and therefore fails.[20] The only way of saving the gift over is to read the previous gift as a mere life interest, so that the first donee is bound at his or her death to leave *all* the property to the second donee.[21] It may perhaps be doubted whether the general rule is in truth an instance of uncertainty, for at the time when B's interest is to vest, the property will be certain. Perhaps it could better be put upon the doctrine of repugnancy to the absolute gift, as exemplified in the rule against attempts to alter the law of intestacy (Underhill 71–2).

Another case quoted by Snell on this species of uncertainty is *Curtis* v. *Rippon*. This is relevant if it be assumed that there was certainty of intention, although in fact it appears that the judgment proceeds rather upon the ground that there was no intention to create a trust. But it may be suggested that even if the intention had been clearly indicated,

[18] *Sifton* v. *S.*, [1938] A.C. 656.

[19] 7 App. Cas. 321.

[20] *Parnall* v. *P.* (1878), 9 Ch.D. 96; *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438; *Re Dunstan, Dunstan* v. *D.*, [1918] 2 Ch. 304, and the other cases in Farwell, *Powers*, 3rd ed., 545.

[21] *Horwood* v. *West* (1823), 1 Sim. & St. 387; *Re Sanford, Sanford* v. *S.*, [1901] 1 Ch. 939.

the wife would still have taken an absolute interest, in accordance with the rule in *Lassence* v. *Tierney*.[22]

It would evidently make no difference in any of these cases if instead of being given to B the uncertain part were given to an uncertain beneficiary. But if the first beneficiary, A, is uncertain, the case will fall within our next, and last, rule.

(iii) If the property transferred on trust is certain, the intention is certain, and the beneficial interest meant to be given (otherwise than by way of graft upon a previously-given absolute interest) is certain, there will be a resulting trust, as in case (i). The authorities on this have already been discussed. But where the words used are precatory, uncertainty of object, like uncertainty of beneficial interest, may show that no trust was intended.[23]

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[22] (1849), 1 Mac. & G. 551; cp. Underhill 178–9.
[23] See Farwell, 546–8.

THE CHOICE OF LAW FOR TORT LIABILITY IN THE CONFLICT OF LAWS*

THE English rule on tort liability in the conflict of laws was stated as follows in the leading case of *Phillips* v. *Eyre*[1]:

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

This rule was approved by the Court of Appeal in *The Mary Moxham*,[2] again by the Court of Appeal in *Machado* v. *Fontes*,[3] and by the House of Lords in *Carr* v. *Fracis Times & Co.*[4] Nevertheless, it has met with a good deal of criticism. Dr. Cheshire seems to approve of the first part of the rule, but to disapprove of the second.[5] Dr. Gutteridge, commenting on Cheshire's views, expresses the opinion that " Dr. Cheshire's devotion to symmetry appears to have overcome his better judgment in this instance."[6] Professor Lorenzen, on the other hand, seems to hold just the opposite view to that of Cheshire, disapproving of the first part of the rule, but accepting the second.[7] Mr. Foster regards neither part of the rule as satisfactory.[8] In view of this wide divergence of opinion, it would seem worthwhile to examine the history and implication of these rules rather more fully than some of their critics have done in the discussions referred to. It may be stated in advance that the submission of this article will be that both parts of the accepted rule are, in their present form, undesirable, and out of harmony both with the fundamental principles and the general function of the conflict of laws.

In the following discussion the different parts of the established rule will be considered separately.

* I am indebted to Mr. J. H. C. Morris, of Magdalen College, Oxford, who read this article in manuscript and made many valuable suggestions.

[1] L.R. 6 Q.B. 1, 28, 9 (1870).

[2] 1 P.D. 107, 115 (1876 C.A.).

[3] 1897, 2 Q.B. 231, 233 (C.A.).

[4] 1902, A.C. 176, 182.

[5] Cheshire, *Private International Law*, 2nd ed., 1938, pp. 302–5; cf. Cheshire, *Private International Law*, 51 L.Q.R. 76, 86 (1935).

[6] Gutteridge, *Book review of Cheshire's Private International Law* (1st ed.), 6 Cambridge, L.J., 16, 20 (1936).

[7] Lorenzen, *Tort Liability in the Conflict of Laws*, 47 L.Q.R. 483 (1931), reading his remarks on *Machado* v. *Fontes* at p. 490, with his general observations at p. 500.

[8] Foster, *Some Defects in English Rules of Conflict of Laws*, 16 Br. Year Book of I.L. 84, 95 (1935).

I. The wrong must have been of such a character that it would have been actionable if committed in England

In order to undertake an examination of such choice of law rules as these, it is necessary to bear in mind certain fundamental principles of the conflict of laws, which, though they may seem elementary, are nevertheless of paramount importance, and often forgotten.

The science of the conflict of laws cannot be reduced simply to a process of enforcing foreign-acquired rights. In spite of Dicey's quite justified acceptance of this principle as the basis of the English decisions,[9] and its endorsement by Professor Beale in his monumental treatise,[10] this does not afford an adequate *rationale* or ultimate premise from which a complete system of legal rules either has been or can be deduced.[11] Nevertheless, it remains true that in many conflict of laws cases what is commonly known as a "right" has (as is commonly said) "arisen" under an ascertainable system of foreign law with which the case in question has some particular connection—the connection very often being that the events in question happened within the territorial jurisdiction where that system of foreign law prevails. One of the functions of the conflict of laws is to determine according to what law or laws a case that involves some foreign element or elements should be determined. In those cases where a "right" has clearly "arisen" under some system of foreign law, in virtue of which the plaintiff brings his action in the court of the forum, it is usual to determine the case according to that particular system of foreign law. (That is why it is said that "foreign-acquired rights" are "enforced.") In other cases, where the facts may have occurred in several jurisdictions, or where the forum for some reason does not wish to determine the case according to the foreign law which would *prima facie* seem competent, the solution may be more difficult, and other principles may be applied. (Then the inadequacy of the "vested rights" theory will be apparent.) Whether the case be simple or complex, it is thought that two propositions have in practice been, on the whole, accepted by courts which administer developed systems of law, and are, in theory, desirable. These two principles are the following:

(1) That when "rights" have "arisen" abroad, they should be given effect to, subject to the public policy of the forum.

[9] Dicey, *Conflict of Laws*, 5th ed. (1932), p. 17.

[10] Beale, *Treatise on the Conflict of Laws*, 1935, pp. 1968–75.

[11] See Cook, *Logical and Legal Bases of the Conflict of Laws*, 33 Yale, L.J. 457 (1924); Cook, *Tort Liability and the Conflict of Laws*, 35 Columbia, L.R. 202 (1935); Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q.R. 483 (1931); Arminjon, *La notion des droits acquis en droit international privé*, Recueil des Cours de l'Académie de Droit International, 1933, II, 5.

(2) That, so far as possible and subject to the above, the same set of facts should meet with a similar adjudication in whatever country the action is brought; in other words, the accident of the forum should be immaterial.

In the case of the civil liability which arises from a tortious act, when all the relevent facts (apart from the bringing of the action) have occurred in the same jurisdiction[12] it is clear that the question whether a "right" has "arisen" abroad can only be determined by reference to the law of the place of injury. It would also seem that the most convenient method of achieving uniformity of decisions, independently of the accident of the forum, would be by reference to the law of the place of injury.

For these reasons the generally accepted criterion for the determination of tortious liability is the *lex loci delicti commissi*. Savigny preferred the *lex fori* (but stated that the forum should be either at the place of the act or the domicil of the defendant).[13] This view, however, though applied by the *Cour de Cassation* as late as 1894,[14] has found no general acceptance. In France the principle of the law of the place of injury now finds the support both of the text-writers and the courts.[15] The same may be said of a number of other European countries and of the Bustamente Code[16]; also of the United States.[17] In Germany this same principle is accepted as the general rule, though an exception is made in the case of German nationals, on whom no greater liability may be imposed by the law of the place of injury than would be under German law.[18] Indeed Lorenzen goes so far as to say that England only enjoys the company of China and Japan in insisting on the application of the law of the forum as well as that of the place of injury.[19]

Even in England, the general principle of the competence of the law of the place of injury is accepted. Willes, J., speaking for seven judges in the Court of Exchequer Chamber, said in the case of *Phillips* v. *Eyre*[20]:

[12] The difficulties that arise when the relevant facts have occurred in more than one jurisdiction may be found discussed in Lorenzen, *op. cit. supra, n.* 11, at pp. 491–4. They will not be discussed in the text, though it is recognised that special problems then arise in determining the place of injury.

[13] Savigny, *Conflict of Laws*, tr. Guthrie, 2nd ed., 1880, pp. 217, 218, 253. Apparently Waechter held the same view, see Lorenzen, *op. cit.*, p. 488, n. 18.

[14] *Cour de Cassation*, May 29, 1894, Sirey, 1894, I, 481.

[15] *Lapradelle et Niboyet, Répertoire de droit international privé*, vol. 5 (1929), pp. 491–2.

[16] *Ibid.*; Bustamente Code, ss. 167–9.

[17] Beale, p. 1289; *Restatement on the Conflict of Laws*, ss. 378–9.

[18] Introductory Act to the German Civil Code, s. 12.

[19] Lorenzen, *op. cit.*, p. 499.

[20] L.R. 6 Q.B., 1, 28 (1870).

> "The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. . . . A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. . . . And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law."

Fourteen years previously Dr. Lushington, in the High Court of Admiralty, had accepted the same principle[21]:

> "The principle which governs all these questions of jurisdiction and remedies is admirably stated by Mr. Justice Story, Conflict of Laws, c. 14, 'In regard to the rights and merits involved in actions, the law of the place where they originated is to be followed. . . .' "

Why then is English Law committed to the principle that a foreign tort, in order to be actionable in England, must also be actionable by the *lex fori*?

This rule has its origin in the case of *The Halley*.[22] This was an action commenced in the High Court of Admiralty for damage suffered in a maritime collision that occurred in Flushing Roads. The defence was that the collision was due to the negligence of a pilot, whom the defendants were compelled to take on board by the Belgian or Dutch laws which prevailed in and over the river Scheldt. It was admitted that this would be no defence according to the law of the place of injury, but would under English law. The court of first instance, by allowing the defendants' reply, held, in effect, that the question of liability was to be determined according to the law in force where the collision occurred; but the Privy Council, on appeal, reversed this decision on the ground that[23]:

> ". . . it is, in their Lordships' opinion, alike contrary to principle and authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

Of the two grounds of principle and authority, neither bears very close scrutiny. To take the latter first, the only cases referred to

[21] The Zollverein, Swabey Adm., 96, 98 (1856).
[22] L.R. 2 P.C. 193 (1868).
[23] *Ibid.*, at p. 204.

were *The Amelia*[24] and *Simpson* v. *Fogo*,[25] neither of which, on examination, appears to have much relevance, for the former was concerned with statutory construction, and the latter with the enforcement of a foreign judgment. Unfortunately, counsel failed to direct their Lordships' attention to two authorities which had a good deal of relevance, though to the contrary effect. These were The *Nostra Signora de los Dolores*[26] and *The Zollverein*.[27] In the former of these cases the part-owner of a privateer was held liable for the capture of a Spanish ship on the High Seas in time of peace, even though under English municipal law he would not have been held to be a part-owner, as his name did not appear on the ship's register; while in the latter case the plaintiffs were allowed to recover for damages suffered in a maritime collision, even though they would not have been able to recover under English municipal law, as they had violated the provisions of an Act of Parliament.

Nor does the decision of the Privy Council seem much more convincing on grounds of principle. The principle relied on was that stated by Story in the following words[28]:

> "It is difficult to conceive upon what ground a claim can be rested to give to any Municipal laws an extraterritorial effect, when those laws are prejudicial to the rights of other nations or to their subjects."

It is quite clear, of course, that there is no such ground. The relevance of this proposition, however, is very much less obvious than its truth. Though the statement that foreign laws have no extraterritorial effect has an initial plausibility whenever one is disinclined to apply them, this plausibility is no more than apparent. Foreign laws (or domestic laws, for that matter) never have any extraterritorial effect. That is a proposition too obvious to need proof, though not, apparently, too obvious to need repetition. It is not only the Island of Tobago that cannot pass a law to bind the rights of the whole world. It is just because foreign laws do not have extraterritorial effect *proprio vigore*, that the science of conflict of laws has been developed to decide when they shall be applied. Choice of law rules select a foreign law as applicable because they consider it suitable or competent, never because it has extraterritorial effect. Accordingly, it appears that the quotation in *The Halley* from Mr. Justice Story, while undeniably true, is

[24] 1 Moo. P.C. (N.S.) 484 (1863).
[25] 1 H. & M. 195. (1863).
[26] Dodson, 290 (1813).
[27] Swabey Adm. 96 (1856).
[28] Story, 6th ed., 1865, p. 32, quoted L.R. 2 P.C. at p. 203.

equally applicable to all conflict of laws cases, and leaves untouched the question at issue, namely what is the desirable choice of law rule for foreign torts, always granted that no foreign law must be compulsorily applied.

Any decision on grounds of principle of the problem involved in *The Halley* necessitates an enquiry less superficial than this. Such an enquiry reveals at once analogies in other types of cases involving foreign elements. The conflict of laws, by reference to the appropriate foreign law in a particular case, frequently confers a right or gives a remedy in respect of an act from which no such right or remedy would arise under English municipal law. If that were not the case, the conflict of laws would be a sterile science and a poor instrument of justice. The English courts have enforced an Italian agreement that would have been invalid under English law for lack of consideration.[29] They have recognised the discharge of a contract ineffective under English law.[30] They have allowed an action in quasi-contract that arose under Hungarian law, but would not have arisen under the law of the forum.[31] They will recognise matrimonial property rights of a sort unknown to English law[32]; the same will apply to a Soviet marriage.[33] Why should compliance with English law be interposed in the case of torts, if not in these other categories of legal obligation? No ready answer suggests itself to this question. The fact that another system of law sees fit to give rise to different rights and obligations from those known to the municipal law of England is not generally thought a sufficient reason to deny them recognition in our courts. Any departure from this general rule in the case of tortious liability is thought to be an occasion for considerable regret. The healthier attitude is surely that of the late Mr. Justice Cardozo in the New York Court of Appeals, in the case of *Loucks* v. *Standard Oil Co.*[34], which was an action brought in New York under the wrongful death statute in force in Massachusetts: the following statement, though perhaps excessively devoted to the vested rights theory, is excellent in its bearing on the necessity for compliance with the *lex fori*:

> "A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no

[29] *Re Bonacina*, 1912, 2 Ch. 394. Contrast *Kaufman* v. *Gerson*, 1904, 1 K.B. 591.

[30] *Ralli* v. *Dennistoun*, 6 Ex. 483 (1851).

[31] *Batthyany* v. *Walford*, 36 Ch.D. 269 (1887).

[32] *De Nicols* v. *Curlier*, No. 1, 1900 A.C. 21; *De Nicols* v. *Curlier*, No. 2, 1900, 2 Ch. 410.

[33] *Nachimson* v. *Nachimson*, 1930, P. 217.

[34] 224 N.Y. 99, 110, 111 (1918).

reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is not to be exalted into an indispensable condition."

Another explanation of the attitude of the Privy Council in *The Halley* that would be in accordance with principle, and would have afforded an adequate ground for the decision, would be the doctrine of public policy. It is a well settled rule of the conflict of laws that no court can be expected to give to a litigant a remedy which will conflict with its own distinctive conception of public policy. Unfortunately, the Privy Council went further, and laid down a general rule of compliance with the *lex fori*. They could have achieved the same result in the particular case, and formulated a much better rule on torts, if they had based their decision on the ground that it would be against the public policy of the forum to impose liability on the employer of a "compulsory pilot." This is what the German *Reichsgericht* has done in a similar case.[35] It is thought that a better decision still would have been to allow recovery, even though the Belgian method of solution was different from our own. Such a solution cannot be very offensive to our sense of justice, for we have substantially adopted it by statute since the date when *The Halley* was decided.[36] But if the Privy Council was determined not to allow recovery, then, little as one wishes to encourage the encroachments of that unruly horse called public policy, a decision on that basis would have done less violence to the principles of the conflict of laws than that which has laid down the first part of the accepted rule on foreign torts. Undoubtedly at the bottom of the rule laid down by the Privy Council was the fear that (in the words of Cheshire[37]):

". . . there is a danger that to allow all foreign torts to be justiciable in England might possibly entail the occasional recognition of claims that appear undesirable or even offensive to English eyes."

But in view of the ultimate residuum of control exercised by the law of the forum through the established rules (1) of public policy, and (2) that all questions of procedure are determined by the

[35] *Reichsgericht*, June 25, July 9, 1892, 29 RG 90, cited Lorenzen, *op. cit.*, p. 498, n. 57.
[36] Pilotage Act, 1913, 2 & 3 Geo. 5, c. 31, s. 15.
[37] Cheshire, *Private International Law*, 2nd ed., 1938, p. 302.

lex fori,[38] this danger would seem to be largely illusory. It is to be hoped, therefore, that if ever the question comes up for reconsideration, it will be remembered that the rule as laid down by the Privy Council in *The Halley* was far wider than was necessary for the decision, and has isolated our jurisprudence from what is almost the unanimous rule of all civilised countries, with the exceptions of China and Japan.

II. The act must not have been justifiable by the law of the place where it was done

The second half of the English rule on foreign torts was formulated in *Phillips* v. *Eyre* itself.[39] This was an action for false imprisonment in the island of Jamaica, the imprisonment having been ordered by the defendant, who was governor of the island, in the course of the suppression of a rebellion which broke out there. Subsequently an Act of Indemnity had been passed by the legislature of the island, and had received the assent of the defendant, in his capacity as governor, and the royal assent, indemnifying the governor and other authorities in respect to all acts done in order to put an end to the rebellion. It was very properly held that the act of the defendant, having been legalised by the law of the place of injury, could not form the basis of an action in tort before the English courts. In reaching this decision, the Court of Exchequer Chamber formulated the rule quoted above.

Both this decision on the facts of the case, and the rule that "the act must not have been justifiable by the law of the place where it was done" are, in themselves, unexceptionable. What is to be sincerely regretted is the way in which the words "not justifiable" have been tortured since *Phillips* v. *Eyre* was decided. In order to understand how the English tort rule has developed, we must look at some of the later cases in which it has been applied.

The Mary Moxham[40] was an action in England for damages caused to the plaintiffs' pier in a Spanish harbour through the negligent navigation of the defendants' ship. The defence was that by the law of Spain there was no liability imposed on the owners of the vessel, but only on the master and mariners. Counsel for the plaintiffs argued that there should be recovery if the act was "not justifiable" within the meaning of the rule in *Phillips* v. *Eyre*; that this act was clearly not justifiable by the law of Spain, as it gave rise to an action for damages against the

[38] On the application of this rule to foreign torts, see Robertson, *Characterization in the Conflict of Laws* (Harvard 1940), Chapter IX.
[39] L.R. 6 Q.B. 1, 28 (1870).
[40] 1 P.D. 107 (1876, C.A.).

master and mariners; and that consequently recovery should be allowed in England against the owners, who would be liable under English law.[41] The Court of Appeal very properly rejected this argument, holding the immunity of the owners under Spanish law to be a good defence in England, on the ground that the question of who may be held liable for a foreign tort is a question of substantive law, and not of procedure.

Machado v. *Fontes*[42] was an action brought in England on account of the publication of a libel in Brazil, such publication, by the law of Brazil, imposing no civil liability, but amounting to a ground for criminal proceedings. Taking the words "not justifiable" from the judgment of Willes, J., in *Phillips* v. *Eyre*, the Court of Appeal held that such a publication, being criminal by the *lex loci*, was actionable in England. Lopes, L.J., based his decision on the ground that the two cases of *Phillips* v. *Eyre* and *The Mary Moxham* established the rule that:[43]

> "in order to constitute a good defence to an action brought in this country in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed."

The Mary Moxham was, as we have seen, authority directly to the contrary, for the act relied on there was a ground for civil liability against different defendants; it was certainly not innocent. Rigby, L.J., came out with the rather surprising statement:[44]

> "It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be."

Leaving aside the question whether a criminal prosecution is in any sense a *remedy* (it certainly is not in the accepted sense of *remedial* as distinguished from *penal*[45]), it is clear that the nature of the remedy for a wrong in a foreign country is of the greatest importance, it having been stated as long ago as 1789 by Lord Loughborough that:[46]

> "It is a general principle that the penal laws of one country cannot be taken notice of in another."

and more recently by the Privy Council just four years before the decision of *Machado* v. *Fontes*, that:[47]

[41] *Ibid.*, at p. 113.
[42] 1897, 2 Q.B. 231 (C.A.).
[43] *Ibid.* at p. 233.
[44] *Ibid.* at p. 235.
[45] Cf., e.g. *Salmond on Jurisprudence*, 8th ed., 1930, p. 134.
[46] *Folliott* v. *Ogden*, 3 T.R. 726 (1789).
[47] *Huntington* v. *Attrill*, 1893, A.C. 150, 156 (P.C.). Cf. *Huntington* v. *Attrill*, 146 U.S. 657 (1892). Cf. also *Raulin* v. *Fischer*, 1911, 2 K.B. 93.

> ". . . no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches (i.e. "breaches of public law punishable by pecuniary mulct or otherwise") by the *lex loci*, ought to be admitted in the courts of any other country."

Our law has indeed reached a state of strange complexity if a foreign penal law may not be enforced in England, but a foreign criminal law may, by the procedure of framing the action in tort.

Walpole v. *Canadian Northern Railway*[48] and *McMillan* v. *Canadian Northern Railway*[49] were two decisions of the Privy Council on appeal from Canada, in which workmen sought to recover damages for injuries suffered in the course of their employment, no damages being recoverable by the law of the place of injury, as the common law right had been taken away by the statutory provisions for workmen's compensation. In each case the action failed on the ground that the action complained of was neither actionable nor punishable by the *lex loci*, and[50]

> "an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule."

The decisions themselves, of course, are eminently sound, but only preserved the semblance of conformity with the rule of Willes, J., in *Phillips* v. *Eyre* by violence to the King's English. As Cheshire says:[51]

> "It is obvious that this is to give a strained and artificial meaning to the word *justifiable*. . . . it is odd phraseology, if not an abuse of language, to say that an accidental injury to a workman is justifiable from the point of view of the employer."

The real ground for the decisions in these two cases seems to have been that the act or neglect complained of was *not actionable* by the law of the place of injury.[52]

In view of the Procrustean treatment that has been given to the words "not justifiable," one may wonder why they have survived so long. The reason is probably to be found in the following passage from the judgment of Rigby, L.J., in *Machado* v. *Fontes*:[53]

[48] 1923, A.C. 113 (P.C.).
[49] 1923, A.C. 120 (P.C.).
[50] *Walpole's* case at p. 119.
[51] *Cheshire*, p. 301.
[52] This argument is borrowed from *Cheshire*, pp. 298–302.
[53] 1897, 2 Q.B. 231, 234.

> "Willes, J., in *Phillips* v. *Eyre*, was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions which he was about to enunciate, I cannot doubt that the change from 'actionable' in the first branch of the rule to 'justifiable' in the second branch of it was deliberate."

Whether or not the change was deliberate, the true explanation of the use of the words "not justifiable" instead of "actionable" in the second part of the rule is probably the following. It appears from the report[54] that Willes, J., based this part of the rule on three earlier cases. These were *Blad's Case*,[55] *Blad* v. *Bamfield*,[56] and *Dobree* v. *Napier*.[57] The first two of these were concerned with a Dane who had seized certain property of the defendant in Iceland by order of the King of Denmark, and sought an injunction to restrain the defendant from suing him in the English courts. *Dobree* v. *Napier* was an action for damages against Admiral Napier for his seizure of the plaintiff's ship, a seizure committed inside Portuguese waters by order of the Queen of Portugal, and later judged lawful by the Portuguese Prize Court. In the former two cases it was alleged that the order of the King of Denmark was a breach of international law; in the latter, that Admiral Napier's service under the Queen of Portugal was an offence under the English Foreign Enlistment Act. In both cases it was shown that the act complained of was not merely, from the negative point of view, "not actionable," but was positively justifiable; particularly was this material in *Blad's Case*, where the plaintiff, seeking an equitable remedy, had to show that he came into court with clean hands. Consequently, the judgments in these cases speak of justification, and not of actionability, which is one reason why Willes, J., did the same in *Phillips* v. *Eyre*. Another reason why he did so was that the act complained of in the case before him (the arrest during the suppression of a rebellion) may have been originally actionable, but was subsequently legalised by the Act of Indemnity. The word "justifiable" therefore described the arrest much more accurately than the words "not actionable."

To sum up the criticisms, then, that have been made of the application in practice of the second half of the rule in *Phillips* v. *Eyre*, namely that "the act must not have been justifiable by the law of the place where it was done," the following points may be made:

[54] L.R. 6 Q.B. at p. 29 (1870).
[55] 3 Swan. 603 (1673).
[56] 3 Swan. 604 (1674).
[57] 2 Bing. N.C. 781 (1836).

(1) The words "not justifiable" have undoubtedly been given a very strained meaning.

(2) The reasoning of *Machado* v. *Fontes* is faulty both on authority, because

(*a*) It assumed that the words "not justifiable" meant "innocent," and *The Mary Moxham* had already decided to the contrary.

(*b*) The authorities cited did not support it.

(*c*) In effect, it ignored the rule laid down by the Privy Council in *Huntington* v. *Attrill.*

and on principle, because it ignored the general principle (to be discussed shortly) that was laid down in *Phillips* v. *Eyre* as follows:[58]

> "A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto."

(3) The words "not justifiable," that were originally used to show that damages would not be awarded in respect of an act which was not actionable by the *lex loci*, *even though* it was a breach of international law,[59] or criminal by the law of England,[60] have come to be used to hold that damages will be awarded in respect of an act which was not actionable by the *lex loci*, *just because* it was criminal by the foreign law.

(4) If the normal meaning of words counts for anything, the authority of *Machado* v. *Fontes* is, in effect, considerably diminished by *Walpole* v. *Canadian Northern Railway* and *McMillan* v. *Canadian Northern Railway.*[61]

Accordingly, in so far as one's arguments must depend on the examination of precedent, and the refutation of the errors of one learned judge by the wisdom of another, it seems that a good case can be made out to the effect that the second half of the rule in *Phillips* v. *Eyre* has been at least modified, perhaps partly overruled, and, in any event, has been so curiously interpreted that the sooner it is done away with the better. The chief reason, however, for wishing it out of the way, is not the discrepancy revealed by the verbal exercise of comparing and contrasting decisions, but the consideration of principle that the proper criterion for tort liability is the law of the place of injury.

That the law of the place of injury is the almost universally accepted choice of law rule for tort liability has already been

[58] See *supra*, n. 20.
[59] *Blad's Case, Blad* v. *Bamfield*, 3 Swan 603, 4.
[60] *Dobree* v. *Napier*, 2 Bing. N.C. 781 (1836).
[61] 1923 A.C. 113, 120 (P.C.).

stated.[62] This is particularly evident in the United States, where the judges are much more experienced in cases of this sort than in England. Their attitude is well expressed in the classic and oft-quoted statement of Mr. Justice Holmes in the Supreme Court of the United States in the case of *Slater* v. *Mexican National Railway*,[63] a case in which action was brought in Texas for an injury suffered in Mexico:

> "But when such liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is, that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending upon the foreign law for the foundation of his case, and yet to deny to the defendant the benefit of whatever limitations on his liability that law would impose."

This doctrine is exactly the same as that quoted above from *Phillips* v. *Eyre*,[64] that is to say the general statement of principle given by Willes, J., which afforded the context for the particular rules subsequently enunciated, a context which has since been forgotten while the literal wording of the rules has been remembered.

The practical reason why the law of the place of injury forms the most appropriate criterion for tortious liability is that it affords one readily ascertainable system of law by which the defendant's liability can be judged in any forum. This is not merely a question of convenience or consistency for our courts of law, but also one of elementary justice to the parties. If the English courts will afford a remedy in England in respect of an act which is not tortious by the law of the place where it was done, it means that a man entering this country may find attaching to him with respect to his previous conduct all sorts of liabilities which he had

[62] *Supra*, p. 29.

[63] 194 U.S. 120, 126 (1904); cf. also *Western Union* v. *Brown*, 234 U.S. 542, 547 (1914).

[64] See *supra*, p. 29.

no means of suspecting or ascertaining at the time and place of his acts. That is why the decision in *Machado* v. *Fontes* is so unsatisfactory on grounds of principle, quite apart from the inconsistency with precedent and the linguistic contortions already noticed. As Professor Beale writes:[65]

> "The result of the English doctrine is to extend to a plaintiff a right to recover damages for an act which was no legal injury to him, and to impose on the defendant a burden which the law of the place where he committed his act or caused events to happen did not impose. It is opposed to what seems an obvious requirement of justice; that a person may rely upon the law of the place where he acts or in which he causes events to happen and may expect no legal consequence of his act except such as the law at that place attaches to it."

As contrasted with Mr. Justice Holmes' statement of his *obligatio* theory, both Professor Lorenzen and Professor Cook prefer the attitude of Learned Hand J., which was expressed in *Disconto-Gesellschaft* v. *U.S. Steel Corporation* in the following words:[66]

> "It is indeed commonly said that when a court must consider the legal effect of events happening elsewhere, it enforces foreign law. That I conceive is a compressed statement, which it is at times useful to expand. Of necessity no court can enforce the law of another place. It is however the general law of all civilised peoples that, in adjusting the rights of suitors, courts will impute to them rights and duties similar to those which arose in the place where the relevant transactions occurred."

In another place Professor Cook has expressed this same idea as follows:[67]

> "The forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected."

[65] Beale, *Treatise*, pp. 1292–3.

[66] 300 Fed. 741, 744 (1924), quoted Cook, *Tort Liability in the Conflict of Laws*, 35 Columbia L.R. 202, 225; cf. Lorenzen, *Tort Liability in the Conflict of Laws*, 47 L.Q.R. 483, 486.

[67] Cook, *Logical and Legal Bases of the Conflict of Laws*, 33 Yale, L.J. 457, 469 (1924). Cf. Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 Columbia L.R. 247, 279 (1920).

Starting from this proposition, therefore, that the forum always applies its own law, and arguing that it alone is competent to decide what its own law shall be, Professor Lorenzen concludes:[68]

> "In deciding the case as it did, *Machado* v. *Fontes* therefore reached a conclusion which is entirely defensible from the standpoint of the fundamental theory of the conflict of laws."

From what has been said in this article it is apparent that the decision of *Machado* v. *Fontes* was, on the present submission, entirely indefensible from the standpoint of the fundamental theory of the conflict of laws. How reconcile or choose between these different views?

In this connection it must be noticed that there are two quite different senses in which it may be said that a court applies its own law:

(1) In the first place, a court always applies its own law in the sense just quoted from Professor Cook. The judgment of the court is law rather than mere expression of opinion by virtue of the authority conferred on the court by the state whose judicial organ it is. The conflict of laws rules it applies are its own, and are a branch of its own law. In other words, the *selective law* applied is always the law of the forum.

(2) In the second place, it may be said that the forum applies its own law in the sense that its own "internal law" ultimately determines the rights of the parties. This will be the case if its choice of law rule leads to the application of its own municipal law; but it will not be the case if its choice of law rule leads to the application of the municipal law of some other country or state. Thus, while the *selective law* applied is always that of the forum, the *dispositive law* applied frequently is not.

From this distinction it appears that the statement that the forum always applies its own law in the first sense (on which all schools of thought are agreed)[69] leaves quite untouched the question whether its own law should be applied in the second sense. While the *selective law*, or choice of law rule, is always that of the forum, the question remains what that choice of law rule should be. Each country, of course, is competent to determine this question for itself. It might choose to apply to all cases its own internal or *dispositive* rule; equally, it might always decide (on such facts) as the English court did in *Machado* v. *Fontes*. There is no doubt that it is possible for a court to apply any rule which it pleases; the question is whether it is desirable for it to

[68] Lorenzen, *op. cit.* 47 L.Q.R. 487.
[69] See, e.g. Beale, *Treatise*, p. 53; *Cheshire*, p. 11; references given *supra* n. 67.

do so. Therefore, when Professor Lorenzen says that *Machado* v. *Fontes* is entirely defensible from the standpoint of the fundamental theory of the conflict of laws, no one can take exception to that view if he only means that it was competent for the English court to decide the case in any way it pleased. But it must be remembered that the argument that the court always applies its own law goes so far, and no farther, and leaves quite untouched the outstanding (and more interesting) problem of what the choice of law rule should be. Accordingly, if we seek the assistance of the fundamental theory of the conflict of laws to help us evaluate the possible choice of law rules for tortious liability, the proposition that the forum always applies its own law only leads to the bald, and indeed self-evident statement, that the court is competent to decide this question as it sees fit. We must have recourse to other propositions of fundamental theory if we wish to discriminate between different possible choice of law rules. It is at this stage of the enquiry that the two propositions enunciated above[70] will be of assistance; and the two principles of the recognition of foreign-acquired rights and the uniformity of decisions will indicate that the desirable choice of law rule for tortious liability is that which selects the law of the place of injury.

To summarise, then:

The first part of the English tort rule, that the wrong must be of such a character that it would have been actionable if committed in England, is based on *The Halley*, a decision that was founded on reasoning that was faulty both on principle and authority: on principle, because it purported to derive from a statement of Story that foreign laws have no extraterritorial effect, which is perfectly true of all conflict of laws cases, but irrelevant to the question at issue; on authority, because the cases cited were not in point and two cases to the contrary were ignored. The second half of the English rule, that the act must not have been justifiable by the law of the place where it was done, is founded on *Phillips* v. *Eyre* itself, and was unexceptionable as applied to the facts of that case, but is undesirable as subsequently interpreted in *Machado* v. *Fontes*. This decision was also faulty both on principle and authority: on principle because it ignored the general rule stated in *Phillips* v. *Eyre* that:[71]

> ". . . the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law";

[70] *Supra*, p. 28.
[71] See *supra*, n. 20.

and on authority, because it ignored the effect of the decisions in *The Mary Moxham* and *Huntington* v. *Attrill*. The authority of *Machado* v. *Fontes*, however, is considerably diminished by the two decisions of the Privy Council in *Walpole* v. *Canadian Northern Railway* and *McMillan* v. *Canadian Northern Railway*.

The accepted English tort rule has only once been passed on by the House of Lords, and then only *obiter*. This was in *Carr* v. *Fracis Times & Co.*,[72] in which the alleged tort was the seizure of the plaintiff's ship by the defendant, acting under the orders of the Sultan of Muscat and within his territorial waters. It was clear that there was no liability under any reasonable theory, and the decision to that effect in no way confirmed either *The Halley* or *Machado* v. *Fontes*. It would seem, therefore, particularly in view of the recent decisions of the Privy Council, that it is open to the House of Lords to reconsider the English rule on tort liability, and to establish it on a more satisfactory basis. It is to be hoped that an opportunity will soon be presented to bring our law in this respect into line with almost all other systems of civilised jurisprudence. If and when such opportunity arises, it is submitted that the desirable rule that should be established is that the existence and extent of liability for foreign torts are to be determined according to the law of the place of the alleged injury. The reasons for this view may be summarised as follows:

(1) That where "rights" have "arisen" under the foreign law, this rule provides the best mechanism for their recognition and enforcement in England.

(2) That this rule best satisfies what seems to be "an obvious requirement of justice" that, in general, a man should be able to rely on the law in force at the place where he acts, and not be subject to different liabilities on account of his past acts in the different countries to which he goes.

(3) That this rule is most likely to achieve uniformity of decisions in different national courts.

(4) That this rule will take us one step nearer the rather shadowy goal of uniformity of rules of private international law, its almost universal adoption in other systems of law being a strong *prima facie* argument in its favour.

While the law of the place of injury should be applied as the general rule, the law of the forum will exercise a residuum of control in this, as in all, types of conflict of laws cases, owing to the two rules that no right will be enforced which clearly offends

[72] 1902 A.C. 176.

the public policy of the forum, and that questions of procedure are determined by the *lex fori*. But the concept of public policy should be restricted within the narrowest possible limits, and the law of the forum only applied on this account as, in the words of Niboyet,[73] "un remède exceptionnel et exorbitant." Similarly the concept of procedure should be narrowly construed, in order to give as much effect as possible to the foreign substantive law.[74] This will contribute to the achievement of the objects outlined above, which are thought to represent the essential function of the conflict of laws.

[73] Niboyet, *Manuel de droit international privé*, 2nd ed., 1928, s. 490.
[74] See *supra*, n. 38.

A. H. Robertson.

STATUTES

Limitation Act, 1939

This Act, which came into operation on the 1st July, 1940, is founded upon the Fifth Interim Report of the Law Revision Committee. Although there are no revolutionary changes, the Act is undoubtedly one of the most important legislative events of recent years from the point of view of the legal profession. By the accidents of historical development and as the result of judicial legislation this branch of the law displayed a bewildering diversity of rules and was incumbered with artificial distinctions. The Act simplifies the law and to the extent to which this is possible establishes uniform rules with regard to conceptions material to all periods of limitation. The Schedule of repealed enactments attached to the Act, extending from a section of "An Act concerning Informers" of 31 Eliz. c. 5 to sections of the Arbitration Act, 1934, indicates the magnitude of the task confronting the Committee and the degree of consolidation achieved. The Report of the Committee excels again as an accurate and elegant statement of the law and as a fair presentation of the case for reform. But whereas progress usually lags behind professional opinion, in this instance the reforms enacted exceed on occasions the recommendations of the Committee. Every legal system requires an efficient machinery of revision. The creation of a Committee commanding the respect of all branches of the profession has done much to justify the non-existence of a Ministry of Justice. It is to be hoped that even in the present emergency the Committee will be able to continue its work, inspired by the bias and indeed zeal for reform to be expected from a Law Revision Committee instead of the caution and hesitation to which the Fifth Report sometimes inclines.

The Act consists of thirty-four sections divided into three parts. Part I enacts periods of limitation, Part II deals with extension of these periods, Part III contains general provisions. The law as to the limitation of common law actions has been consolidated and reformed in sections 2 and 3. Reform of the Statutes of Limitation has invariably shortened the periods. The present Act on the whole continues that practice. This tendency of reform is not directed against the sanctity of property since the loss of protection suffered by the old owner is compensated by strengthening the position of the new owner. The explanation lies probably in the acceleration of movement within organised society due to increased commercialisation. A more radical reform substituting for the system of fixed periods flexible periods dependent on the discretion of the court or the moment of actual or constructive notice of the existence of a claim was rejected. But it should be noted that a reform which almost seems inspired by the American school of realist jurisprudence should have been given careful consideration. Such a system would allow the law to be applied with a greater degree of flexibility and justice in the individual case. But it would involve a sacrifice of certainty which, in the words of the Committee, is "the fundamental benefit conferred by statutes of limitation."

Section 2 introduces a uniform period of limitation of six years for actions in simple contract and for all actions in tort. The period of limitation for actions on specialties is reduced from twenty to twelve years. For the purposes of limitation of actions statutes do not fall any more under the category of specialty since a six year period is provided for statutory actions other than for a penalty or forfeiture. The distinction

between actions founded completely or only to some extent upon a statute, illustrated by *Pratt* v. *Cook*,[1] has thus lost its importance. Similarly, the single period of limitation for all actions in tort has reduced the importance of the distinction between trespass and case.[2] In other respects, however, the forms of action continue to rule us from their graves. Thus the period begins to run from the date on which the cause of action accrued. It remains, therefore, material to examine which is the cause of action pursued and to master technicalities of pleading before the Judicature Acts. The Committee admit that this is not satisfactory but declare themselves unable to devise a better solution. Practitioners will obtain much needed assistance on this subject from the comprehensive discussion in the commentary on the Statute by Preston and Newsom.[3] Adherence to the system of the forms of action rather than a more scientific arrangement is shown by the omission of quasi-contract from section 2 (1) (*a*) which divides common law actions into simple contract and tort. This failure to give statutory recognition to quasi-contract as a source of obligation conflicts not only with scientific arrangement but also with modern trends of judicial opinion which have undermined the belief that quasi-contractual claims are founded on implied contract. The matter is still more confused by section 2 (2) which provides a six year period for actions of account. No such provision has been recommended by the Committee and it would seem superfluous in view of the comprehensive character of section 2 (1) (*a*) read together with section 2 (7), which provides that the Act is not to apply to equitable remedies and that in their administration, as formerly, Equity is to follow the law.

Section 3 dealing with conversion is another provision enacted without the support of the Law Revision Committee. The Committee considered the advisability of extinguishing the right as well as barring the remedy but decided to make no recommendation since the present position did not create any real hardship. It would seem that the subject deserved a more detailed examination. The title of an innocent purchaser from a wrongdoer against whom the right of action had become barred was undecided.[4] Again, *Wilkinson* v. *Verity*[5] created doubt as to the case where successive conversions had been committed by the same wrongdoer. Although these difficulties might have been solved by judicial authority, they were sufficiently substantial to warrant legislative action. Section 3 (1) removes all doubts by enacting that in the case of successive conversions all remedies are lost six years after the original cause of action accrued. In section 3 (2) the legislator boldly proceeds to enact that after that period the title shall be extinguished. This assimilates chattels to realty. As in the case of realty it will be essential to bear in mind that the section destroys title but does not create a new method of acquisition of property in chattels. It is also necessary to consider the effect of section 3 (2) on criminal law. A possibly unintended consequence of the reform may be to deprive criminal courts of the power to order restitution under section 45 (2) of the Larceny Act, 1916, in cases where the title to the property has become extinguished. Since these orders are issued to save recourse to civil litigation for the restoration of the stolen property they cannot be

[1] See *infra*, p. 58.
[2] *Barnes* v. *Pooley* (1935), 51 T.L.R. 391.
[3] "Limitation of Actions," by Preston and Newsom. lviii and 480 pp. The Solicitors' Law Stationery Society, Ltd. 1940. 32s. 6d. net.
[4] Salmond, "Law of Torts." 9th ed., p. 334.
[5] (1871), L.R. 6 C.P. 206.

issued after the loss of the right of action and of the title to the property.[6] The hardship thus suffered by the victim of the offence if the criminal manages to elude justice for six years is not mitigated by the doctrine of concealed fraud. This difficulty might have been avoided if the question of title were kept distinct from the limitation of actions.[7] Adoption of a system of acquisitive prescription which pays attention to the conduct of the new owner might have been considered and it seems that the Law Revision Committee might have found that a comparison with the Roman *usucapio* and the law of prescription of easements and profits fell within their terms of reference.

Under the next cross-heading "Actions to recover land, advowsons and rent" the law has chiefly been consolidated, with few changes, such as the reduction of the period of limitation for actions for the recovery of land by the Crown or by spiritual or eleemosynary corporations to thirty years. This change indicates the relation between the period of limitation and the length of title which can be demanded by a purchaser.[8] A full commentary on this part of the Act is given by Preston and Newsom. Another innovation is contained in section 18 (1) which subjects actions by a mortgagee of personal property to a period of limitation of twelve years. This is another instance of the assimilation of the law of personalty to realty.

Section 19 simplifies the law of limitation of actions in respect of trust property. All constructive trustees are now subject to the same restrictions when claiming the protection of the Statute as express trustees. Thus the obstacle presented by *Soar* v. *Ashwell*[9] to a proper classification of trusts has been removed. Section 8 (1) (*b*) of the Trustee Act, 1888, has been re-enacted. The disappearance of the "mysterious" clause (*a*) of that section will cause no regret. But "the curious spectacle of a defendant shunning the character of executor and courting that of trustee"[10] will remain. By section 20 personal representatives are subjected to the same restrictions in claiming the protection of the Statute which formerly applied to express trustees and now, under section 19 (1) and section 31 (1), to all trustees. But actions claiming personal estate are only barred after twelve years (arrears of interest after six years). The difficult distinction between personal representatives and trustees will thus still have to be drawn, even in cases of intestacy where, as a result of the statutory trust for sale, this had become unnecessary. This is explained by the desire to assimilate the position of personal representatives under a will to intestacies. Section 21 deals with actions against public authorities. The Public Authorities Protection Act, 1893, illustrated two major defects of the English legal system—the absence of any clear division between private

[6] On the other hand, section 3 (2) would seem not to abrogate the effect of those convictions under the Larceny Act which automatically re-vest the property. Such re-vesting takes effect in spite of, and indeed presupposes, transfer of title. It is, moreover, designed to encourage prosecutions, an objective which loses none of its force by the expiry of six years from the date of the offence.

[7] *Cf.* Buckland and McNair, "Roman Law and Common Law," p. 329. "The Romans kept quite distinct the notions of barring an action and of acquisition of property by long enjoyment. Our law has failed to grasp this distinction and deals with these two different matters in an empirical and frequently puzzling manner."

[8] See also Section 22 proviso (*c*) which reproduces section 5 of the Real Property Limitation Act, 1874.

[9] (1893) 2 Q.B. 390.

[10] Hanbury, "Modern Equity," 2nd ed., p. 357.

law and administrative law and the inadequacy of statutory interpretation by an unsympathetic judiciary. Failure to deal separately with *fautes de service* and *fautes personnelles* was bound to produce hardship when the protection meant to be enjoyed by the former could be claimed by the latter. The Act attempts a compromise solution of this difficulty by lengthening the period of limitation from six months to one year and by changing the absolute character of the period to one subject to the same extension as other periods of the Act, with the proviso in section 22 (*d*). The Law Revision Committee points out that the Courts refused to mitigate the hardships which arose from the rule that the period was to run from the date of the act complained of. Under section 21 the period, as other periods under the Act, is to run from the date of the accrual of the cause of action. This gets over the difficulty presented by cases where the cause of action is not complete before damage has occurred. It still leaves unsolved, as is shown by Preston and Newsom, the problem of cases of continuing damage caused by a single act. As to the drafting of the section, it seems that the addition of a few paragraphs might have avoided the annoying method of legislation by reference employed in section 21 (2).[11]

By section 1 the various periods laid down in Part I are to take effect subject to extensions due to causes enumerated in Part II. Consolidation inevitably improved the law of extension in case of disability by providing, in section 31 (2), a general definition and, in section 22, a general rule as to its effect on all periods dealt with in the Act in the place of conflicting provisions under previous statutes. Only three types of disability are now recognised, infancy, unsoundness of mind, and imprisonment under sentence of death or penal servitude. The position of enemy aliens is not dealt with in the Act nor in the Report but it is discussed in a useful note by Mr. Newsom on the effect of the war. His conclusions would seem to apply to civil internees who present a problem which naturally was not anticipated. Preston and Newsom point out that the abolition of the status of convict under the Criminal Justice Bill, 1939, might have led to difficulties in the case of persons serving long terms of imprisonment for whom no administrator or curator had been appointed. The avoidance of these difficulties is perhaps the only good which has come of the abandonment of the Bill. Section 31 (3) reverses the patently unjust decision in *Harnett* v. *Fisher*.[12] Here again the Statute shows more boldness than the Report which referred the matter to a revision of the Lunacy Laws.

Complete uniformity as to the effect of acknowledgments and part payments would be impossible. Thus, where the period of limitation operates to extinguish the right, acknowledgment or part payment will be ineffective if given after the extinction of the right, but no similar qualification is imposed on their effect where only the remedy is barred, although in these cases the acknowledgment or part payment will operate only against the person giving the acknowledgment or making the payment and their successors, section 25 (5) and (6). This important distinction between periods of limitation extinguishing the right and barring the remedy rests still on decisions under the old statutes.[13] It has not been

[11] A slip will be found in the discussion of this sub-section by Preston and Newsom. The word "plaintiff" in the twelfth line on p. 278 should read "defendant."

[12] (1927) A.C. 573.

[13] *Sanders* v. *Sanders* (1881), 19 Ch.D. 373; *Beamish* v. *Whitney* (1908), 1 Ir.R. 38; *Re Alison* (1879), 11 Ch.D. 284; *Re Clifden* (1900), 1 Ch. 774; but *Hervey* v. *Wynn* (1905), 22 T.L.R. 93.

given statutory recognition except by inference from the wording of section 25 (1). The subject is best understood by following the arrangement adopted by Preston and Newsom in one of the best chapters of their book and by considering separately actions to recover land, foreclosure and redemption actions, and money claims. It seems that it has been overlooked to provide for actions to recover chattels although the title to the chattels is now lost after the period has expired. The most important change of the law relating to this cause of extension of periods of limitation consists in the abolition of the requirement of a promise, express or implied, in addition to the acknowledgment of a simple contract debt. This assimilates the law to specialty debts. As a result of this change it can now be maintained that the main object of the Act is to protect defendants who have lost the evidence needed to resist demands made after a lengthy interval of time. This view as to the object of the Statutes had been expressed by Abbott, C.J., in *Mountstephen* v. *Brooke*.[14] But Chief Justice Best in *A'Court* v. *Cross*[15] preferred to explain the policy of the Statutes as concerned with the suppression of "stale demands." It has since remained customary to state both views as the policy pursued by the Statutes. The fact that the opinion of Chief Justice Abbott has now been restored may be of some importance when it becomes necessary to examine the object of those sections of the Act in which the remedy is barred, for instance for the purposes of classification in Private International Law. In future the courts will no more be compelled to examine "the exact meaning and effect of the words employed by generations of shifty debtors."[16] The difficulty and thanklessness of this task were best illustrated by the famous decision in *Spencer* v. *Hemmerde*.[17] Section 24 (1) requires all acknowledgments to be by signed writing. Section 24 (2) abolishes some troublesome distinctions and extends the operation of the maxim "*Qui facit per alium facit per se*" by allowing all acknowledgments to be made by or to an agent. As against the former rule in the case of specialty debts it has now also become impossible to take advantage of acknowledgments given to third parties.

In section 26 the widest possible effect is given to fraud and mistake as causes for the extension of limitation periods. They operate now in all causes of action dealt with in the Act, whether the action be based on fraud or be fraudulently concealed. This finally ensures the victory of Equity over common law according to McCardie, J.'s opinion in *Lynn* v. *Bamber*.[18]

Of the general provisions which form Part III of the Act it is only necessary to mention section 27 (6) which extends the application of the Act to statutory arbitrations. As to arbitrations by agreement, the relevant provisions of the Arbitration Act, 1934, are substantially re-enacted. Section 28 assimilates the effect of counterclaims to that of set-offs, since both are now deemed to stop the running of the period as from the beginning of the action in which they are pleaded. Section 29 which should be read together with section 2 (7) preserves the equitable doctrines of laches and acquiescence, although their scope has been restricted by the enactment of statutory periods for a number of equitable claims in other parts of the Act. Section 30 applies the Act, subject to a few exceptions, to the Crown and thus abolishes the distinctions under the old law. Section

[14] (1819), 3 B. & Ald. 142.
[15] (1825) 3 Bing. 332.
[16] Lord Sumner in *Spencer* v. *Hemmerde* (1922), 2 A.C. 507, at p. 534.
[17] *Supra*, n. 16.
[18] (1930), 2 K.B. 72.

32 saves periods of limitation prescribed by particular enactments the more important of which are discussed in the twelfth chapter of Preston and Newsom.

The Law Revision Committee considered whether the Statute of Limitation should be given the effect generally of extinguishing the right as well as barring the remedy. The Report enumerates some instances where the distinction is material. In one instance, actions to recover chattels, the law has been changed. As to the remaining points, it appeared to the Committee that "the arguments on the merits seem pretty evenly balanced." It seems possible to state even in stronger terms the case against changing the effect of the Statute. Where at present only the remedy is barred the policy of the law can be explained satisfactorily as conferring a protection upon a debtor of which for some honest scruples he may not wish to avail himself. In this connection the Committee also considered Mr. Beckett's suggestion for reform of the rules of Private International Law as to limitation of actions.[19] But this does not seem to be quite the appropriate context for the consideration of this question. Mr. Beckett is not concerned with the problem whether the Statute should operate to extinguish the right or only to bar the remedy. His criticism is directed against the use of this distinction as the test whereby statutes of limitation, particularly those of foreign systems, are classified in English Private International Law. No recommendation was made by the Committee on the surprising ground that it is a matter of considerable difficulty. In stating that it should be considered separately the Committee seemed to imply that the subject is one suitable for reform by statute. It seems that in making his suggestion Mr. Beckett was expressing his despair of changing the wrong course of reasoning obstinately pursued by the decisions. It is usual to invoke the aid of the legislature whenever a rule believed to be unjust has become so well settled as that in *Huber* v. *Steiner*.[20] Yet it seems difficult to imagine that an Act of Parliament overruling this decision should cure the mischief described by Mr. Beckett. The correct classification of the statutes of limitation, like other general problems of Private International Law, must be solved by the theory of Private International Law. Decisions cannot permanently arrest the progress of this science, they merely reflect prevailing theories and are liable to change with them. In the opinion of the present writer, the problem will not be solved until the correct method and the proper function of classification have been appreciated, in particular the fact that the categories of classification, in this case "substance" and "procedure," cannot be conceived as mutually exclusive.

Finally, it remains to acknowledge the assistance derived in this survey of the Act from the commentary of Preston and Newsom. The codification of the subject means that in future practitioners will wish less for a treatise arranged under some scientific pattern than for a commentary following as closely as possible the progress of the Statute. This has been realised by the learned authors and their work is, therefore, bound to occupy a leading place in the literature on the subject.

J. Unger.

[19] 15 British Year Book of International Law (1934), 76.
[20] (1835), 2 Bing. N.C. 202.

NOTES OF CASES

Building Schemes affecting Leasehold Property; Liability of a Landlord not to derogate from his Grant.

It is not easy to extract the facts in *Newman* v. *Real Estate Debenture Corporation* from the report in [1940] 1 All. E.R. 131, but they appear to be as follows. The first defendants were a corporation which leased a building composed of a shop on the ground floor and four flats above. They sub-leased the top flat to the plaintiff, taking from him a covenant, which was to be found in the sub-leases of the other three flats, to use the premises for residential purposes only. In August, 1938, the corporation granted a sub-lease of the whole building, subject to the plaintiff's sub-lease of the top flat, to the second defendants, a company called Flower Decorations, Ltd., who wished to extend the business part of the premises so as to take in the flats on the first three floors. The necessary structural alterations were finished by the middle of the following November, and after that time the whole of the building, with the exception of the plaintiff's flat, was devoted to the business of the company. In the action which the plaintiff brought against the corporation and the company, it was alleged that the defendants were liable under three heads. The first was nuisance, which was said to consist in (*a*) the disturbance caused by the structural alterations from August to November, 1938, and (*b*) the annoyance arising out of the way in which the business was run from November, 1938, onwards. The second was breach of the implied obligation not to derogate from the grant to the plaintiff, *i.e.* not to do anything which would render his flat materially less fit for the purpose of living in as a residence. The third head was breach of the restrictive covenant not to use the upper floors of the building otherwise than for residential purposes, which covenant was said to be implied from the existence of a building scheme.

The first point to get clear is the relationship between the parties. Though there are statements in the judgment which have led commentators to the conclusion that the corporation assigned the residue of its lease to the company (89 *L.J. News*, 27 and 84 *Sol. J.* 248), we are informed by the defendants' solicitors that the transaction was a sub-lease for twenty-one years of the whole building, subject to the plaintiff's tenancy of the top flat which still had more than four years to run. The company, therefore, occupied a dual rôle. It was sub-lessee of the ground floor and the first three floors, but until the plaintiff's tenancy expired it was not so much sub-lessee of the top flat as lessee of the corporation's reversionary interest therein. This is what Atkinson, J., meant when he said at p. 150 that the company was "being sued as owner of the leasehold reversion" and that the corporation had "parted with (its) interest in the reversion." Those statements are accurate as long as it is understood that the reversion in question is the reversion expectant on the determination of the plaintiff's tenancy, *i.e.* the right of the company to the rents and profits from the plaintiff, which right would come to an end at the expiry of four years when the company's sub-lease would take effect in possession.

As far as the corporation was concerned, it was held liable for the nuisance arising out of the structural alterations on the ground that the disturbance, though temporary, "was not caused by a lawful and proper exercise of their powers, but by an exercise which was in breach of their duty to the plaintiff" (p. 147). Two points call for comment here. In the

first place, the alterations did not take place till after the sub-lease to the company, and normally it is the occupier of premises who is liable in nuisance. On the facts as stated in the report, the only explanation of the corporation's liability would be that it had expressly or impliedly authorised the company to commit the nuisance in question (*Harris* v. *James* (1876), 45 L.J.Q.B. 545), but we are informed by the defendants' solicitors that the alterations were actually carried out by the corporation under the terms of a contract made simultaneously with the sub-lease to the company. The second point is that if the alterations had not been in breach of a duty towards the plaintiff, the learned judge would not have held that they constituted a nuisance. The duty which was disregarded by the corporation was that which arose under the building scheme, so that there was liability in nuisance only if the existence of the restrictive covenant could be proved.

Dealing with the implied covenant not to derogate from the grant to the plaintiff, Atkinson, J., said that he was "satisfied that the corporation broke this covenant by the nuisance for which they were responsible" (p. 147) and awarded a single sum in respect of damages both for the nuisance and for the breach of this covenant. In the headnote it is stated that "the letting of the flats for business purposes was such a derogation," and since this is nowhere explicitly stated in the judgment, it is presumably based on the remarks of the learned judge at p. 146 where he said: "I have held that the corporation committed a breach of covenant in permitting the premises to be used for business purposes." It is true that this might refer to the implied covenant not to derogate, but more probably it is the implied restrictive covenant which is meant, because the preceding part of the judgment deals almost exclusively with the latter and the former is mentioned only incidentally. Moreover, a single sum was awarded for the corporation's liability in nuisance and for derogation; had there been a breach of the obligation not to derogate in addition to the nuisance, some damages must have been awarded in respect of it. But even if there is nothing in the judgment to support the suggestion, it is an attractive one which seems correct. Once the existence of the restrictive covenant is established, the grant to the plaintiff is the grant of a flat in a building exclusively reserved for residential occupation, and there is an obvious derogation from that grant if the corporation lets the other flats for business purposes. But whichever view is taken, it is clear that according to *Browne* v. *Flower*, [1911] 1 Ch. 219 there would have been no liability for derogation had the plaintiff failed to prove a restrictive covenant.

It was, therefore, essential to prove a building scheme if the corporation was to be liable at all. Atkinson, J., considered the principles governing building schemes generally as expounded in *Elliston* v. *Reacher*, [1908] 2 Ch. 665, and dealt with the application of those principles to buildings containing flats in *Hudson* v. *Cripps*, [1896] 1 Ch. 265, *Gedge* v. *Bartlett* (1900), 17 T.L.R. 43 and *Jaeger* v. *Mansions Consolidated, Ltd.* (1903), 87 L.T. 690. *Hudson* v. *Cripps* is the decision on which the others are founded, and it is interesting to remember the comment made on it by Jolly in *Restrictive Covenants affecting Land* (2nd ed. at p. 68): "It is submitted that this case goes further than any previous decision." It is, in fact, a frontier case beyond which the Courts cannot go without seriously extending the scope of the building scheme principle. The learned judge considered that the case before him was on a par with those just cited, for the area to which the scheme was said to apply was ascertained, there was a common lessor who had imposed almost identical restrictions on each

tenant which "were consistent, and consistent only, with a general scheme of management" (p. 141), and "each lessee knew or took it for granted that the restrictions imposed on him were also imposed on the other lessees, and were so imposed for their mutual benefit *inter se*" (pp. 137–38).

When these cases are examined, however, they will be found to relate to buildings in which the business of letting flats was carried out on a large scale. In *Hudson* v. *Cripps*, the plaintiff's flat on the second floor was numbered 21 and there were floors above; in *Gedge* v. *Bartlett* the plaintiff lived in flats numbered 32 and 34; in *Alexander* v. *Mansions Proprietory, Ltd.* (1899), 16 T.L.R. 431, a "flat" case not mentioned by the learned judge, the flats were numbers 66 and 67; and in *Jaeger* v. *Mansions Consolidated, Ltd.* (1903), 87 L.T. 694, though exact numbers cannot be given, the building in question is described as a large one "being divided into blocks having outer doors and staircases for the common use of all the tenants of flats in such blocks." It is also worthy of note that in the first and last cases the business of the lessors was large enough to have special tenancy agreement forms printed which were used in each lease. In these cases it is possible to say that a scheme of management or development of the whole building existed, but it is stretching words to say that the same is true in the present case where the so-called scheme could apply only to the five floors of a building above a shop. If the learned judge is correct, it would follow that if the owner of a house divides it into two flats and lets them to tenants subject to the same restrictions, a building scheme arises which binds him also. On this reasoning London must be full of hitherto unsuspected building schemes. It may be said: "Assume that a building scheme cannot exist where there are only two flats; how many flats must there then be before a scheme can be implied? If not three, will four be enough?"—and so on. The idea is, of course, to lead the victim on to a position where he will assert that a building scheme is possible if the building has x number of flats but not possible if the number is only $x - 1$. The fallacy in such a line of argument was exposed forty years ago by Lindley, M.R., in a case where the blocking of a street by carts was alleged to be a nuisance (*A.-G.* v. *Brighton & Hove Co-operative Supply Association*, [1900] 1 Ch. 276, 282):

> "It is urged that it is difficult to draw the line. I admit that it is extremely difficult. . . . It is always a question of degree. It may be asked, What is the difference between one cart and two, and so on? You cannot draw the line in that way. Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak-tree is a plant and not an animal?"

With great respect, there can be little doubt on which side of the line the present case falls.

It is somewhat ironical that Atkinson, J., should cite *Browne* v. *Flower*, [1911] 1 Ch. 219 on the question of derogation from grant and ignore it on the building scheme point, for in that case Parker, J., whose views on building schemes in *Elliston* v. *Reacher* he quotes as authoritative, refused to allow the existence of a building scheme in a situation much closer to the one we are considering than any which arose in the *Hudson* v. *Cripps* line of case. In *Browne* v. *Flower* a building was divided into more than two flats (the exact number cannot be ascertained from any of the reports but there cannot have been many more than two), and all the tenants had

covenanted not to use the flats for other than residential purposes; Parker, J., said (at p. 224):

> "I do not see my way to hold that there was any such scheme for letting Fulthorpe Mansions as would bring the case within *Spicer* v. *Martin*. It is true that there is a similar stipulation in all the leases of flats in the mansions, but . . . that was because of certain covenants in the head lease, and not in order to benefit the tenants of the flats generally. It is quite certain that in other respects there was no single form of lease prepared or adopted for all the flats, nor did the plaintiffs inquire, nor were they informed, as to the terms on which other flats in the building were let or intended to be let."

Every word in this quotation applies to the present case. Atkinson, J., says that "the restricted user cannot be explained as being necessary to secure compliance with covenants in a head lease" (p. 137) without giving any reason why; the covenants in the leases of the flats were a little more detailed and stringent than those in the head lease but that was probably done *ex abundanti cautela* and alone cannot justify the learned judge's statement. He says that he has "no doubt whatever that Newman took it for granted that everyone held subject to the same restrictions, and that every newcomer would hold on the same restrictions" (p. 137) but there appears to have been no affirmative evidence on this point such as Parker, J., thought necessary. Finally, there was no common printed form of lease which was used in each of the tenancies. It is submitted, therefore, that the decision of Atkinson, J., in this case that a building scheme existed is not supported by the authorities he cited and is in conflict with the views of Parker, J., in *Browne* v. *Flower*. We are informed by the defendants' solicitors that notice of appeal was given but that the plaintiff preferred to compromise on the terms of accepting a sum less than his taxed costs in discharge, and this strengthens our view that the decision is one which should not be followed.

The learned judge then turned to consider the case against the company and held it responsible for the nuisance arising from the way in which the business was conducted, but, curiously enough, did not impose liability on it for the nuisance caused by the structural alterations though it was in occupation at the time when they were carried out. In dealing with the company's liability under the covenant not to derogate from the grant to the plaintiff, he started off by saying that it was an obligation restrictive in character which would "*prima facie* bind the company if they took this lease with actual or constructive notice of (it), or, rather, with notice of the facts and circumstances from which (it is) to be implied" (p. 134). With great respect, the question of notice or no notice has nothing to do with the case, for the obligation not to derogate runs *at law* so as to bind an assignee (*Cable* v. *Bryant*, [1908] 1 Ch. 259) or a lessee (*Rigby* v. *Bennett* (1882), 21 Ch.D. 559) of the burdened land. The obligation not to derogate, which runs between vendor and purchaser as well as between landlord and tenant (*Wheeldon* v. *Burrows* (1879), 12 Ch.D. 31), can exist only if the landlord retains land which adjoins the demised premises, and the obligation binds subsequent holders of the adjoining land because the rights of the landlord in dealing with that land have been diminished at law by his implied grant. The obligation does not run with the reversion of the demised land, for if the ownership of that reversion and the ownership of the adjoining land become separate, the obligation attaches to the latter. The obligation is, therefore, *sui generis*. It differs from a covenant

under *Tulk* v. *Moxhay* because it binds holders of the servient land, notice or no notice; it differs from covenants running under *Spencer's* case in that it binds persons other than assignees of the reversion; and it differs from covenants which run with the land at law in that the burden passes to subsequent assignees.

In fact, Atkinson, J., held that the company was bound by the obligation not to derogate (p. 147) before he went on to consider the question of notice (p. 148) which was relevant only to its liability under the restrictive covenant. He held that the nuisance arising from the way in which the business had been conducted constituted a breach of the obligation and awarded a single sum as damages both for the nuisance and for the breach. As in the case of the corporation, we suggest that, once liability under the restrictive covenant is established, then breach of that covenant is also breach of the covenant not to derogate. It is interesting to note that Atkinson, J., refused to grant an injunction simply on the ground of derogation from grant (p. 147), presumably because the damage resulting therefrom was not substantial enough (*Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437).

Finally, the learned judge held that the company had notice of and was bound by the restrictive covenant arising under the building scheme. Notice was imputed to it on the rather unsubstantial ground that its officers and agents knew that the flats were used only as private dwellings and had seen the plaintiff's lease which clearly indicated that "there was —or, at any rate, might be—a scheme for using the flats for residential purposes only" (p. 149). Counsel for the company tried to argue that even if his clients had notice of the scheme, it could not be enforced against them because it had not been entered on the Register. As the land in question was in the Administrative County of London, the relevant statutory provisions are to be found in ss. 23 and 50 of the Land Registration Act, 1925, and neither s. 198 (1) of the Law of Property Act, 1925, nor s. 10 (1) D (ii) of the Land Charges Act, 1925, were in point. Even when a building scheme affects freehold land, there are obvious difficulties in the way of registering it (Jolly, *op. cit.*, p. iii), though there is no trouble about registering the covenants taken by the vendor from the individual purchasers. But where the subject-matter of the scheme is leasehold property, as was true in the present case, the covenants between the tenants and the landlord cannot be registered as they are expressly excluded by L.R.A., 1925, s. 50 (1). The view put forward to evade this difficulty was that:

> "if one lessee under a building scheme is being sued by another lessee under the scheme, the covenant under which he is being sued is not a covenant between lessor and lessee, and is, therefore, registrable" (p. 150).

This interesting argument was dealt with by the learned judge in the following way:

> "All I need say is that the company is not being sued as lessee of one of the flats, but is being sued as owner of the leasehold reversion bound by the late lessor's covenants, and these covenants are not capable of registration."

It is submitted with great respect that this is not so, for the restrictive covenant implied under a building scheme of leaseholds binds the landlord, not *qua* reversioner of the plaintiff, but *qua* owner of the rest of the land subject to the scheme. Suppose that A, the lessee of Blackacre, has laid

out the estate in plots in such a way that a building scheme is brought into existence; one of the sub-lessees, P, is guilty of a breach of the restrictive covenant and his neighbouring sub-lessee, Q, wishes to bring an action. He can sue P for committing the breach, and he may be able to sue A, in his capacity as P's landlord, for suffering the breach. But suppose that before the breach is committed, A has assigned his reversion on P's sub-lease to Y and his reversion on Q's sub-lease to Z. Q will be able to sue P, as before, but the liability under which A would have laboured apart from the assignment is transmitted to Y and not to Z. In the present case the company is in the position of both P and Z, but liability is imposed on it in its capacity as P, the sub-lessee, and not in its capacity as Z, the owner of the reversion on Q's sub-lease. Therefore the learned judge was wrong in thinking that it was not necessary to deal with this argument on its merits. It is submitted with some hesitation that the argument would be upheld if the analogy of *The Satanita* ([1897] A.C.59) were applied. It will be remembered that in this case the plaintiff and the defendant entered their yachts for a race and signed an undertaking with the secretary of the club to obey the club's sailing rule; the House of Lords held that the result of these transactions was a contract between the plaintiff and the defendant. If this is so, then the covenant by which the company was held bound was not one between lessor and lessee, and so was registrable. There seems no reason why such an implied covenant should not be entered on the Register, though there is the practical difficulty that it will be hard to persuade the Registrar that such a covenant is to be implied. Had the land been unregistered land, there would have been a further difficulty, for, as Jolly says (*loc. cit.*):

> "The new system of registering restrictions against the name of the covenantor cannot be readily applied to mutual covenants implied by Building or General Schemes, and in the absence of any plan identifying the servient tenement is certain to lead to hopeless confusion."

But even if this argument is wrong, and the covenant on which the sub-lessee is being sued is regarded as one between lessor and lessee, there is a further possibility. There is a body of opinion to the effect that s. 50 of the L.R.A., 1925, refers only to covenants *concerning the land demised* and does not apply to covenants by a landlord concerning the user of land retained by him. We are told in Walford, *Practical Hints on Draft Leases* (2nd ed., pp. 75–75) that the second class of covenants is accepted as registrable at the Land Registry. The learned judge does not discuss this distinction at all and so we can scarcely be said to have a considered decision on whether the Land Registry practice is correct or not. On this point, as on most of the others raised in the case, the judgment of Atkinson, J., leaves something to be desired, and we have a feeling that future generations of lawyers will regard *Newman* v. *Real Estate Debenture Corporation* either as a decision which should never have been reported or as a decision which cannot be law as it is reported.

D. W. Logan.

Pratt v. Cook, Son & Co. (St. Paul's), Limited. (56 T.L.R. 363)

This decision of the House of Lords has settled a point of importance concerning the application of the Truck Acts to a practice widely prevalent in factories and businesses of all kinds, involving the supply of meals to

workers in lieu of part of their wages. The fact that the effect of the decision may soon be set at nought by the passing of a statute legalising the practice complained of in the case in question does not reduce the interest and attention due to the decision of the House of Lords. Indeed, that the passing of such a statute is a probability makes it desirable to study the matter more attentively than might otherwise be necessary, in order that criticism of any such legislation may be founded on a proper understanding of the issues involved, and its retrogressive tendencies more effectively opposed.

In the case of *Pratt* v. *Cook, Son & Co. (St. Paul's), Ltd.*, the plaintiff was an artificer employed by the defendants, who are wholesale drapers, having taken over the business from their predecessors in title in March, 1920. The plaintiff had entered the service of the defendants' predecessors in title in 1900. He joined the army in the war of 1914–18, and on his return to civil life in 1919, he was re-engaged, as a packer, by the firm on the terms that he should be paid 53s. per week, plus dinner and tea, which were valued at 10s. per week (which valuation was admitted by the plaintiff). When the defendants took over, the plaintiff continued his same employment, and received always the minimum wage applicable to his employment, less 10s., and received his dinner and tea. During his holidays, the plaintiff was paid 10s. a week extra in cash.

In December, 1935, the defendants let their men set up a canteen in a part of their premises, rent-free, and from then until the termination of his employment in March, 1936, the plaintiff was paid an additional 10s. per week.

It is of interest to note, in passing, that the plaintiff was an active member of the National Amalgamated Union of Shop Assistants, Warehousemen and Clerks, and the provision of the canteen was the result of an agitation for which he was partly responsible.

After the termination of his employment the plaintiff, we may suppose, had more time at his disposal to consider the legal aspect of the terms of his former employment. Anyway, he decided that the provision of dinner and tea with a deduction of 10s. from his wages was a matter within s. 3 of the Truck Act, 1831, which provides that "the entire amount of the wages earned by or payable to any artificer shall be actually paid to him in the current coin of the realm, and not otherwise; and every payment made to any such artificer by his employer of or in respect of such wages by the delivering to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be illegal, null and void," and so proceeded to claim from his employers the amounts due to him by virtue of s. 4 of the Truck Act, which provides for the recovery of wages or any part thereof which have not been actually paid in current coin of the realm.

Three lines of defence were relied on by the defendants. Firstly, that the plaintiff was not a manual labourer, and so not entitled to the benefit of the Truck Acts; secondly, that the deduction was rendered lawful by s. 23 of the Truck Act, which provides, *inter alia*, that "nothing herein contained shall extend . . . to prevent any employer of any artificer . . . from supplying or contracting to supply to any such artificer . . . any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer . . . for or in respect of any such victuals . . . Provided always that such stoppage or deduction shall not be in any case made from the wages of such artificer

unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer."

The agreement in writing relied on by the defendants was an agreement between the employers' organisation, The Wholesale Textile Federation, and the above-mentioned Union.

A short review of authorities led Wrottesley, J., who gave judgment in February, 1938, ([1938] 2 K.B. 51), to hold that as the plaintiff's employment substantially involved work with his hands, his was in manual labour, although involving a fair amount of skill.

On the question of whether there had been a deduction of wages or not, the learned Judge found little difficulty in holding that in fact there had been a deduction of 10s. per week. In reaching this conclusion, it appears that he was influenced by the fact that the plaintiff was paid an extra 10s. per week while on holiday, and by the fact that when an officer of the plaintiff's Union asked the defendants to pay an extra 10s. per week instead of food, the defendants replied that they thought the existing arrangement more satisfactory, and insisted on adhering to it.

The most difficult point in the case appears to have been the question whether the matter came within s. 23. It was contended by the defendants that the proviso of that section is complied with if an agreement as to deductions be signed, not by, but on behalf of, the workman. Wrottesley, J., expressed a view contrary to this contention, on the ground that the section was drafted in terms indicating that they should be strictly complied with, and that vicarious signing of the agreement (in this case by a Union official) was not in accordance with the requirements of the proviso. His views, however, were obiter, for he found that the employers had never been parties to the collective agreement, in that they had always opposed collective bargaining, and insisted on dealing with their workpeople direct.

The third point raised by the defendants was that most of the claim was statute-barred. The plaintiff's reply to this was that the action was one of debt upon a specialty, and was therefore within s. 3 of the Civil Procedure Act, 1833, which fixes a period of limitation of twenty years for this class of claim. The learned Judge upheld the plaintiff's contention on this point, applying the test laid down by Jervis, C.J., in *Cork & Bandon Railway Co.* v. *Goode*, (1853), 13 C.B. 826: "but for the Act of Parliament this action could not have been brought." Here the plaintiff had only to establish that he was a labourer, and then, once he establishes the matters dealt with in ss. 3 and 4 of the Act, liability attaches to the defendants (see the reasoning of Slesser, L.J., in *Kenyon* v. *Darwen Cotton Manufacturing Co., Ltd.*, [1936] 2 K.B. 193, at 206); such a case as this is, therefore, distinguishable from one where a statute enables a plaintiff to sue on a contract or a cause of action which is outside the statute, as in *Gutsell* v. *Reeve*, [1936] 1 K.B. 272, where the questions in issue arose out of the payment of wages below a minimum rate fixed by the Agricultural Wages (Regulation) Act, 1924, which fixed penalties for such under-payment, but did not, like the Truck Act, 1831, make the contract illegal, null, and void. The defendants further argued that the claim was in the nature of "an action for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force" and that the period of limitation was therefore two years. The answer to this was the definition of the words quoted by the Court of Appeal in *Thomson* v. *Clanmorris*, [1900] 1 Ch. 718, as including only sums payable by way of penalty or punishment.

The Court of Appeal ([1939], 1 K.B. 364) (Slesser and Finlay, L.JJ., Goddard, L.J., dissenting) reversed the judgment of Wrottesley, J., on the issue under s. 23 of the Truck Act, 1831, but agreed with him that the action (were it successful) would be one upon a specialty. It was argued for the appellants that the wording of s. 23 of the Act was such as to require an agreement in writing only for certain things therein set out, and that the requirement of an agreement in writing did not apply to (*inter alia*) meals cooked under the employer's roof. Slesser and Finlay, L.JJ., held that s. 23 falls into two parts: firstly, a list of things (including food cooked on the premises) the supply of which is not to be prohibited by the Act; secondly, deductions, as to which there is the provision, already referred to, about an agreement in writing. They held that as the supply of food was permitted by the first limb of s. 23, the employers were entitled to pay the respondent partly in money and partly in food, and that a part payment in food did not, in this case, involve any deduction from wages. They explained that in their view the permissive words of s. 23, allowing the supply of (*inter alia*) food prepared on the premises, took the permitted thing out of the prohibition contained in ss. 1 and 3, providing that wages shall be paid in current coin of the realm, and not otherwise.

Goddard, L.J., took the view that the prohibition is absolute, and that the permission given by the first limb of s. 23 to supply certain things was dependent on compliance with the provisions of the second limb of the section, namely, that deductions must be the subject of an agreement in writing. He expressed the opinion that the effect of the Act is that the employer must agree to pay, and must pay, wages in money and not in kind; that the employer may contract to supply goods to his workmen as to any other members of the community, but he can only deduct the price from the worker's wages for such goods and services as are set out in s. 23, and if the worker has agreed in writing to the deduction being made.

The opinion of the House of Lords upheld the judgments of Wrottesley, J., and Goddard, L.J., except that it was said that Goddard, L.J., went too far in saying that s. 23 applies only to deductions. Lord Atkin, after an interesting account of the history of the various Truck Acts, which date from 4 Edw. IV, expressed the view that in the case before the House, there was no deduction, but a payment of wages in kind, which was absolutely prohibited.

Lord Romer, agreeing with the motion of Lord Atkin, explained that the first limb of s. 23 authorises the supply of certain things by an employer to his workers. The second limb of the section deals with deductions from wages in respect of such supplies as a separate matter, and specifies the requirement of an agreement in writing.

It appears to the writer of this note that the reasoning in the learned speech of Lord Romer is particularly easy to follow, and puts this by no means simple question in a nutshell.

So there the matter stands, and a partial resuscitation of the ancient system of truck has, for the time being, been stifled. In so far as we may suppose that employers would not attempt such a resuscitation unless it were profitable to them, it seems likely that attempts to render nugatory the decision of the House of Lords will be made.

It should be borne in mind, too, that the development of industrial society has given rise to a need for some amendment to the Truck Acts in the other direction, for when the last of them was passed in 1896, it was not, as now, a reasonable probability that an employer could not only

evade the intention of the Acts, but subject his workmen to a far greater degree of servitude than was possible fifty years ago, by setting up a factory in an undeveloped neighbourhood, and causing all the local shops, houses, and entertainments to be owned by subsidiary companies of the main concern, so that, for example, in the event of a strike, shops and cinemas may be closed, and (unless the houses are within the Rent Restrictions Acts, as they mostly would be now) bring pressure to bear on the strikers through the landlord company. Such action has occurred in one case already, on a very substantial scale.

S. H. MURRAY.

Desertion

The decision of the House of Lords in *Cohen* v. *Cohen* (1940), 56 T.L.R. 597 is to be welcomed for what it actually decides and for the light it throws on the attitude of the Courts towards desertion. The facts were that in 1925 the wife was deserted by her husband. In 1930 she filed a petition for divorce on the ground of adultery but was unable to proceed with it for lack of means. It therefore remained on the file until 1937, when it was dismissed on her application and a second petition filed, also on the ground of adultery, fresh evidence having been discovered. But inquiries did not substantiate this charge and the second petition was dismissed, again on the wife's application, on March 1st, 1938, and on the next day she filed a petition for desertion under section 2 (*b*) Matrimonial Causes Act, 1937.

Now that section makes "desertion without cause for at least three years immediately preceding the presentation of the petition" a ground for divorce, but the difficulty in the wife's way was the Court of Appeal's decision in *Stevenson* v. *Stevenson* (1911), P. 191, where it was held that a period of desertion was automatically ended by the filing and prosecution of a petition, for the petitioner "was praying the Court to require her husband to keep away"; having done this, she could not afterwards complain that his absence was desertion. *Prima facie* this looks reasonable enough, but it ignores earlier decisions and many practical difficulties. In *Knapp* v. *Knapp*, 6 P.D.10, the wife had petitioned on the grounds of adultery and desertion but at the hearing it was found that the desertion had not run for the statutory two years (as required by the Act of 1857); she was allowed to proceed at the end of two years, and the point that the first petition had ended desertion was never raised. In *Wood* v. *Wood*, 13 P.D. 22, a wife petitioned on the ground of adultery and cruelty, but the charge of cruelty failed; she was then allowed to amend by alleging desertion for two years, during part of which time the first petition had been in state of active prosecution.

In both these cases the husband was living in adultery and it was this fact that the Court treated as material; while he was so living the wife was under no duty to return to him and he had shown by his own act that he did not intend to return to her; that being so, the filing of the petition did not affect his intention to desert one way or the other. In *Lapington* v. *Lapington*, 14 P.D. 21, where the facts were substantially the same, Butt, J., was really concerned with the procedural point of whether, when desertion was alleged in place of cruelty, it was necessary to file a new petition or proceed by a supplementary one; he did not suggest that first petition could or did terminate desertion.

In Stevenson's case the Court of Appeal relied mainly on *Kay* v. *Kay* (1904), P. 382, where the wife petitioned on the ground of adultery and cruelty, both of which charges were negatived by the jury and described by the judge as "unfounded." She then filed a petition for judicial separation on the ground of desertion, but Gorell-Barnes, J., dismissed this, notwithstanding the fact that the jury had found desertion. His reason was that the wife's conduct in making quite unfounded charges justified her husband's refusal to return to her and so changed what had initially been desertion into a justifiable absence; the learned judge was only concerned with the previous petition in so far it contained these charges: he did not suggest that that suit *ipso facto* ended desertion.

All these cases rest on the test of intention and to this that the House of Lords has returned in *Cohen's* case (thereby overruling the *à priori* rule laid down in *Stevenson* v. *Stevenson*); thus, in Lord Romer's words (56 T.L.R. at p. 601):—

> "The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end and corresponding question whether desertion without cause has existed for the necessary period must always be questions of fact, and the determination must always depend upon the circumstances of the particular case. I deprecate attempts to lay down any general principle applicable to them all."

Incidentally the way for this decision had been paved by three decisions in the lower Courts, which illustrate the stress to be laid on the parties' intentions, instead of merely looking at their actions. The *Stevenson* principle (to use Lord Romer's term) was distinguished in *Gibbs-Smith* v. *Gibbs-Smith* (1939), P. 170, where a previous petition had been filed but not served and in *Lynch* v. *Lynch* (1939), P. 135), where a petition was filed and served but the parties later resumed cohabitation. In *Jordan* v. *Jordan*[1] (1939), P. 239, it was decided that, where there has been desertion and a petition is filed and afterwards dismissed, its effect is to suspend the desertion and not automatically to end it. Curiously enough none of these cases were cited in *Cohen's* case but they, together with the *ratio decidendi* in *Cohen* v. *Cohen* itself, go a long way to clarify and determine the place of the element of intention in desertion.

G. A. Forrest.

Sale of Goods—Transfer of Property

Re Capon, Trustee in Bankruptcy v. *Knight (R. C.) & Sons*, 1940, 2 All E.R. 135, is a case of some interest in regard to the passing of property on a contract for the sale of goods, a matter comparatively little illustrated in the modern case law. Its chief importance, however, lies in the fact that it may well terminate a somewhat unhealthy type of agricultural finance which appears to have grown up in East Anglia, if not elsewhere, of recent years.

Knight & Sons were a firm of auctioneers who financed a very shaky farmer, Capon, in the following way. Capon's business was the fattening of pigs, but he had not the capital to purchase them in sufficient quantities

[1] *Cohen* v. *Cohen* is inconsistent with *Jordan* v. *Jordan* in that the former decides that desertion can continue while another petition is in progress, whereas in *Jordan's* case it was held that the previous petition suspended but did not end the desertion. I cite it here as an instance of the way in which "the *Stevenson* principle" had been undermined.

to make it pay. He accordingly arranged with Knights that the pigs which he bought in their auction sales should not be paid for until he had fattened and sold them. Knights, of course, had to be secured and this was done by Capon giving to them, before he took the pigs away, receipt notes by which he acknowledged that they remained the property of Knight & Sons, who were to have the right to remove and sell them at any time. In the meanwhile Capon was to be treated as if he had the pigs for agistment. Knights were to be remunerated by the commission on the resale or alternatively by payment of interest on the purchase price. Capon was eventually made bankrupt, and these proceedings arose in order to settle whether the Trustee in Bankruptcy or Knight & Sons were entitled to the pigs.

The Court of Appeal affirming, a Divisional Court held that the property in the pigs had passed to Capon at the time of the original auction sale, and that the subsequent arrangement was a merely colourable attempt to provide a security without the need for registration, and therefore had no effect. The Trustee in Bankruptcy therefore succeeded as against Knight & Sons.

The cardinal rule of English law as to passing of property is of course, that it depends on the intention of the parties (see Sale of Goods Act, 1893, s. 17). In spite of a finding by the County Court judge to the contrary, there could be little doubt that the real intention was a straight sale to Capon, subject to an arrangement for securing the price in the way already indicated, and the able analysis of the evidence by Scott, L.J., made the matter quite clear. But even if it had been left uncertain it is submitted that the Court should have reached the same decision. For one thing the auctioneers would have been acting in breach of duty to their principals the sellers if they had employed Capon to purchase the pigs on their behalf, and the presumption of course is that persons act in accordance with the law. Moreover it must in any case have been obvious that fundamentally the arrangement was one for giving security. Now the policy of Parliament as expressed in statute after statute is that all such securities shall be registered. This is especially so under the Agricultural Credits Act, 1928. If the auctioneers could have, as in fact they tried to do, stood back and relied upon their secret document, these "irregular methods of credit" would have indeed been, as Scott, L.J., described them, "dangerous." "It is," he continues (p. 147), "of the very essence of any healthy system of agricultural credit that suppliers should know, or be able to ascertain, where they stand in regard to a farmer's ostensible assets, and that is the policy of the 1928 Act." Legally speaking, it may be irrelevant, but sociologically it is a pertinent fact that Scott, L.J., was for a number of years chairman of the Agricultural Organisation Society, and as a member of Parliament always played a prominent part in the agricultural discussions of his time.

R. S. T. C.

Hire Purchase

The chief interest of *Menzies* v. *United Motor Finance Corporation*, [1940] 1 K.B. 559, is that it is the first case to be decided under the Hire Purchase Act, 1938 (as to the provisions of which see 2 Mod. L. Rev. 51). It will be recollected that in the case of a hire purchase transaction falling within the scope of that statute the goods cannot be seized by the owner for default of payment of instalments without leave of the Court, but

is in cases where as much as one-third of the instalments has been paid (S. 11 (1)). In the instant case the plaintiff who wished to obtain some money on the security of a motor car purported to sell it to a garage proprietor for £30 on the terms that it was to be hire-sold back to her. For this purpose the defendants were brought in to finance the transaction in the usual way. The plaintiff accordingly signed the usual form of agreement. This recited that she had paid an initial instalment of £25 and agreed to pay a balance of £37 of hire by twelve monthly instalments. Actually she had never paid £25 at all. It does not appear from the facts of the case as reported that this figure was inserted in order to bring the total hire figure to more than £50, at which point the Act ceases to apply to dealings in motor cars or whether the garage proprietor was entirely responsible for it. If the defendants were endeavouring to evade the statute they failed, for the Court of Appeal held that whether the whole affair was a sham or was genuine it came within the Act.

The plaintiff after paying more than half her instalments fell into arrears, and the defendant thereupon seized the car without applying to the Court. The plaintiff thereupon sued them under s. 11 (2) of the Act for repayment of all the instalments which they had received from her. The Court having held that the transaction fell within the statute awarded her this sum. The defendants would presumably retain the car which they had seized, and it is perhaps a matter for discussion whether the penalty imposed by the statute for failure to obtain the assent of the Court to a seizure is heavy enough to be likely to prevent this form of abuse from continuing to be prevalent.

The case contains a further description of the method of hire purchase finance, this time by Goddard, L.J., On this subject reference may be made to 3 Mod. L. Rev. 239. R. S. T. C.

Frustration

In a note on *Tatem* v. *Gamboa*, [1939] 1 K.B. 132, which appeared in an earlier volume of this Review,[1] Mr. Unger in an interesting discussion of the two possible bases for the doctrine of frustration, came to the conclusion that while the authorities on the whole presented an overwhelming case for basing it historically upon an implied term in the contract, this was in reality only a legal fiction (a view shared by Lord Wright: see *Legal Essays and Addresses*, p. 255), and that the time had come for frank recognition that the real question was one of law whether in fact the foundation of the contract had disappeared. Upon this argument he justified the decision of Goddard, J., in *Tatem* v. *Gamboa*, which otherwise appeared to him contrary to the authorities.

Sound as Mr. Unger's argument may appear to be when judged in historical perspective, it should be pointed out that in *Re Comptoir Commercial Anversois and Power Son & Co.*, [1920] 1 K.B. 868, the Court of Appeal had already decided that they must swim with the current. This case does not appear to have been brought to the attention of Goddard, J. If it had, said Branson, J., in *Court Line Ltd.* v. *Dant & Russell Inc.*, [1939] 3 All E.R. 314, he could hardly have expressed the views which he did. Branson, J., considered that an end had been put to the controversy so far as lower Courts are concerned, but he went on to say that he regarded the matter as academic. If this is so it must mean that in any case where the Court is of opinion that the basis of the contract has in fact gone it

[1] See 2 Mod. L. R. 233.

will be prepared to find that there is an implied term to rescind. If this be really so it is difficult at first sight to find a reason why the fiction should be retained.

Imperial Smelting Corporation Ltd. v. *Joseph Constantine Steamship Line Ltd.*, [1940] 2 All E.R. 46, however, shows that the distinction may still be relevant. In this case an explosion occurred in the boilers of a ship which was held to have frustrated a charter-party voyage. The charterer in resisting the shipowner's plea of frustration claimed that the explosion was due to negligence on the part of those responsible for the ship, and the new and important question of burden of proof arose. It was argued that a party relying upon an implied term that in certain circumstances a contract should be regarded as rescinded must show that the circumstances have not supervened as a result of negligence on his part. It is clear that if this were so the implied term theory would work differently from the conclusion of law theory, for under the latter if the Court finds that the basis of the contract has gone it must hold the contract to be frustrated, though doubtless, if one party could prove that this had been brought about by the other a claim would lie for breach of contract. In other words the burden of proof would become vital.

In the instant case, however, Atkinson, J., held it is not for the party contending for the frustration to prove that he has not been negligent, but for the party alleging negligence to prove it. He reached this conclusion by a process of reasoning based upon the application of exceptions clauses in similar documents i.e. charter parties, and bills of lading. It is quite clear that in such cases the onus is upon the party seeking to prevent the application of such a clause (cf. the *Glendarroch*, [1894] P. 226). In the result, therefore, the distinction does turn out to be immaterial.

In conclusion it should be noted that Atkinson, J. (see p. 51), expressed the view that "perhaps it is not yet finally settled whether the true basis upon which the doctrine of frustration of contract rests is the term to be implied into the contract or whether it arises by operation of law as soon as it appears that the basis of the contract has gone." This must mean that he thinks it quite possible that the House of Lords, when the point comes before it, will take a realistic view, and consign the fiction of implied term to the already large heap of other fictions which have out-lived their usefulness.

The decision of Atkinson, J., has now been overruled by the Court of Appeal (1940) 56 T.L.R. 882. R. S. T. C.

Guardianship in Private International Law

The number of authorities on the conflict of laws with regard to the position of parents and guardians towards their children and wards is surprisingly small in this country. For this reason and also for its bearing on the general principles of Private International Law the decision of Morton, J., *In re B's Settlement, B.* v. *B.*, [1940] Ch. 54, is of outstanding importance. It was a case of a dispute between parents for the custody of their infant son who had been made a ward of Court. Both parents and the child were Belgian nationals, and the child was born in Belgium, but the mother was British born and had acquired Belgian nationality by marriage. At the time when the case came before the Court mother and son were resident in England and the father was resident in Belgium, but the report does not indicate where he was domiciled. Divorce

proceedings were pending in Belgium in the course of which (about two years before the present case) the Belgian Court appointed the father guardian pending the proceedings, gave him the custody and ordered the mother to return the child to Belgium within twenty-four hours. When she failed to comply with this order, the Correctional Court in Brussels fined her for disobedience *in contumaciam*. The father now asked the English Court to order the mother to deliver up the infant to him and to give him the custody of the child with liberty to take him to Belgium and to keep him there. While he relied on the order made by the Belgian Court, the mother alleged that it was better for the child's welfare if he remained in England and in her custody, and that, under section 1 of the Guardianship of Infants Act, 1925, the latter argument should alone weigh with the Court. This section provides that, with regard to the custody of infants, the Court "shall regard the welfare of the infant as the first and paramount consideration," while the respective legal claims of father and mother are not to be taken into consideration. There had been in the nineteenth century a change of attitude on the part of the Courts towards the recognition and enforcement of foreign judgments and decrees with regard to the guardianship of infants. (See Dicey, 5th Ed., pp. 552–553.) The earlier view, expressed in *Johnstone* v. *Beattie* (1843), 10 Cl. and F. 42, was to the effect that guardianship was exclusively determined by the law of the child's residence, and that, in this country at any rate, a foreign appointment of a guardian was not allowed to have any extra-territorial effect with regard to children in England. In *Nugent* v. *Vetzera* (1866), L.R. 2 Rg. 704, however, it was held that not only that a guardianship granted by a decree of the Court of the nationality had to be recognized and enforced in England but, what is more, that the guardian could exercise "all such power and control as might have been exercised over these children in their own country if they were there." The question of the "welfare of the children" was not taken into account. This authority was followed by later cases. We are, here, faced with a conflict between the policy of internationalism and that of "internal welfare" and, in the nineteenth century, the former carried the day. With the decision under review the development returns to the point from which it started in the earlier part of the nineteenth century. The learned judge held that, in view of the Guardianship of Infants Act, 1925, the Court "is always bound to exercise a judgment of its own when dealing with the custody of a ward," and "bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration . . . whatever orders may have been made by the Courts of any other country." "Due weight" should be given "to any views formed by the Courts of the country whereof the infant is a national," but no more, and in so far as previous decisions lay down any other rule, they can no longer be followed. The foreign order is only a fact to be "weighed" among others. As it was for the benefit of the infant to remain in England and in the custody of the mother, the Belgian order was not followed and the summons was dismissed. It is interesting to note that, apparently, the child's domicil is of no importance at all and the only Courts which are at all considered to have jurisdiction in matters of guardianship are those of the nationality and of the child's residence, a view which is not shared by Dicey (see p. 556). Dicey's Rule 144 can no longer be upheld in its present form after this decision.

The implications of this decision are far from clear. Does the rule laid down by the Court apply to children resident in this country only, or to all

children whose cases happen to come before the Court? In the latter case the decision would mean that section 1 of the 1925 Act is a rule of international public policy which must claim application despite the fact that a foreign law—that of the child's nationality—is normally applicable, a true example of *ordre public international*. If the welfare principle is, however, confined to children resident in this country, then the rule means that questions of guardianship are primarily governed by the law of the residence. Another difficulty is this: Does it matter whether, as in *Nugent* v. *Vetzera* and in *Di Servini* v. *Lousada*, 18 W.R. 425, the child was originally brought to this country with the consent of the foreign guardian or, as in the present case, taken from the country of the nationality against the foreign guardian's will? In the former case it may be said that the connection between the child and England having been formed by the foreign guardian, it can be severed by him at any time, while in a case like the present this would not be true. And finally: Is there, perhaps, a difference between the existence of the right of guardianship and its exercise? Could it be said that the creation and abrogation of guardianship is within the province of the law of the nationality, but that the powers over the infant's person and their exercise are subject to the paramount control either of the law of the infant's residence or of the *lex fori*? In the present state of the authorities it is difficult to answer these questions.

O. Kahn-Freund.

Income Tax Cases

The Income Tax code provides that, where any person—a term which statutorily comprehends a corporate body—succeeds to a trade previously carried on by another person, as from the date of the change the profits of the successor shall be separately computed as though a new business had been set up at such time—Rule XI (2), Cases I and II Rules, Schedule D Income Tax Act, 1918. In a straightforward case, as where a non-trader acquires an existing business, the rule presents no difficulties either of law or of accountancy; the position, especially from the aspect of computation of profits, is made very complicated where the acquired business is in effect merged in the existing business of the successor.

The refusal of leave to appeal to the House of Lords in two recent cases turning on the construction of this rule, viz.: *Laycock* v. *Freeman Hardy and Willis, Ltd.* (1939) 2 K.B. 1 and *Briton Ferry Steel Co. Ltd.* v. *Barry* (1939), 4 All E.R. 541—shows that the Courts are most loath to interfere with the Appeal Commissioners' decision as to succession or otherwise regarding the matter as essentially one of degree, i.e. of fact which is solely within the competence of these Commissioners; the essential facts in these two cases were set out and discussed at 2 M.L.R. page 323 so need not be repeated here. In the *Briton Ferry Steel Co.'s* case, the Court of Appeal emphasised that the vital consideration was whether the business taken over by, and/or merged in, the successor's business had changed its original character; if it had not, then the mere fact of merger did not prevent the operation of the rule. The *Freeman Hardy and Willis* decision seems to have turned upon its own peculiar facts and therefore cannot be taken as a precedent; in essence, in this case, a business of manufacturing shoes and selling them *wholesale* became, after the succession, one of manufacture and sale *retail*; the character of the business had thus

changed and the rule was therefore not operable. In the *Briton Ferry Steel Co.'s* case, the same business, i.e. manufacture of tinplate from steel bars, was carried on as before the change but this was effected not by separate companies but as a department of the successor company, the character of the business remaining unaltered; the rule operated to charge the appellant company on its profits from this department according to the rules applicable to new businesses. The Master of the Rolls emphasised that it was the actual profits of the successor that were to be charged and not a "notional" profit; he approved, however, any rough and ready method that would yield substantial justice as between the Revenue and the taxpayer.

The dissenting judgment of Scott, L.J., in *Bamford* v. *Osborne* (1940) 2 All. E.R. 317 is an interesting example of the extent to which economic theory is now allowed to form part of the *ratio decidendi* of what a short while ago would have been a case of pure law. The exceptional treatment, for taxation purposes, of the farming industry has long been notorious, see, for example, the Report of the Royal Commission on the Income Tax (1920—Cmd. 615) at pages 98–101 and note at 1 M.L.R. 294. Since the introduction of the income tax, in its present form, in 1806, farmers have been taxed upon a purely "notional" profit being a proportion of the annual value of the lands they occupy e.g. from 1896 to 1914 their profits were taken to be one-third of the annual value, 1915–17 at the full value, 1918–20 twice the value and since then again the full value. This basis of a "notional" profit might work injustice when times were bad so the farmer was given a threefold option, viz. to pay according to the annual value of his lands, upon his *actual* profits for the year of assessment or to be charged under Schedule D, like any other trader; no such option was given to the Crown in cases where profits far in excess of the annual value were made. It must, however, be added that—throughout the duration of the Income Tax—profits from "gardens occupied for the sale of produce," i.e. market gardens, etc., and from nurseries, were computed in the same manner as those arising from any other business. With the huge subsidies lavished on Agriculture in recent years the time has surely come for the farmer to be charged—as recommended by the Royal Commission on the Income Tax in 1920—on his actual profits instead of upon a "notional" sum often far less than his real profit; the unfairness to other tax payers of the present scheme is obvious when it is realised that, for the purposes of National Defence Contribution and of the recent Excess Profits Tax, the farmer is treated in the same way as any other trader.

The facts in *Bamford* v. *Osborne* were, briefly, that some 550 acres of land were worked as one unit; 229 acres were arable land on which vegetables and fruit for sale were grown while the remainder, with one small exception, was employed for ordinary agricultural purposes, e.g. fattening cattle, etc. Modern mechanical methods were used over the whole area and the employees were engaged indiscriminately upon both sections which, however, varied from year to year. The Appeal Commissioners held that the division of the whole farm according to acreages sufficiently identified the two sections and that the 229 acres were "occupied as a garden for the sale of produce" and therefore chargeable upon the actual profits arising therefrom and not on the annual value. It should be noted here that, in *Monro and Cobley* v. *Bailey* (1933) 148 L.T. 505 (H.L.), the House of Lords had held that the distinction between the occupation of land as a "farm" or as a "garden" was " . . . in *all* cases a matter of

degree; no general principle can be laid down to govern them . . ."—so Lord Buckmaster at 17 Tax Cas. p. 623.

The majority of the Court of Appeal in the instant Case held, firstly, that division of the land into two sections identified by acreages was a proper description in law (see, too, a similar decision in Scotland, *Lowe* v. *Inland Revenue* (1937), 21 Tax Cas. 297) and, secondly, that the land to be assessed as a "garden" need not be distinct and separable from the remaining land used as a "farm" so long as the nature of the produce grown on any part of the land appeared to the Appeal Commissioners to be such as to allow that portion to be described as "a garden for the sale of produce"; lastly, the majority held that there was some evidence to justify the Commissioners' finding of fact which could not—in view of the decision in *Monro and Cobley* v. *Bailey*—be disturbed by the Courts.

Scott, L.J., in his dissenting judgment, considered the case one of vital importance to farmers and also to the community at large since, as regards farmers, the annual value basis of taxation gave a substantial fiscal benefit to the skilful farmer who made a large profit and, from the aspect of the general community, because, if farmers were to be taxed upon the actual profit they derived from growing and selling vegetables and fruit, this would deter them from the cultivation of these crops and lead to a serious decrease in the growing thereof and in the consequential supplies to our urban populations. The argument that, to tax a trader's profits in full would deter him from developing his business and thus be against public policy, seems a very strange one to introduce into the interpretation of a taxing statute and no reason is seen why it should be valid for the farming industry and not so for any other; for example, the refusal of the Courts, for taxation purposes, to make any allowance, in the case of mines, for wasting assets has certainly not led to the drying up of mineral supplies to this country! Scott, L.J., in the course of an able historical account of the taxation rule in question (Rule 8, Schedule B, Income Tax Act, 1918) considered that the "gardens for the sale of produce" referred to therein connoted a self-contained and defined unit of land cultivated in a way characteristic of the market gardener with his great intensity of cultivation and further that, throughout the period under review, the land must be so cultivated. He found support for this view in Middleton's "Agricultural Survey of Middlesex," published shortly before the introduction of this rule in the original Income Tax Act of 1806; in this work a distinction was drawn between the considerable profits made by "gardeners" and the much smaller ones by "farmers who garden."

There seems a great deal to be said for the view of Scott, L.J., that the statutory "garden" must be a defined unit of occupation both in relation to space and to time but the decision of the House of Lords in *Monro and Cobley* v. *Bailey* (*cf. supra*) seems to bar the acceptance of this view; in that case there was a mixed farm of which only one-third was used for the cultivation of bulbs, the remainder being worked as an ordinary farm but ancillary to the major object viz. bulb-cultivation. The House of Lords, as we have seen above, held that the determination and extent of the occupation of lands as a "garden" or a "farm" was in all cases one of degree for the sole determination of the Appeal Commissioners. Leave to appeal to the House of Lords was given in the instant case but it seems doubtful whether, in the circumstances, the decision will be disturbed having regard to the prior decision of the ultimate appellate tribunal.

A. Farnsworth.

REVIEWS

LEGAL ESSAYS AND ADDRESSES. By Lord Wright of Durley. pp. xxxv and 442 (with index). Cambridge at the University Press. **15s.** net.

It is a temptation to begin this review with some remarks about other judges who have been authors, but Sir William Holdsworth has already exploited this idea in the *Law Quarterly Review*. His list, however, in so far as it does not consist of authors who afterwards became judges, contains only the names of those who have been dead as long as Queen Anne. Perhaps the most exciting thing about this book is that it breaks a convention. It has long been considered that judges should not write or indeed speak about the law, when off the bench, except in the most general terms, lest they should afterwards be called upon to decide a point on which they have already expressed an opinion. This view holds a poor opinion of the capacity of our judges for independence of legal thought. There have recently been signs that its hold is less strong. Lord Hewart's racy journalism in "The New Despotism" was perhaps not more than a technical infraction of this convention, but Lord Wright's volume deals it a shattering blow, and one from which we hope that it will not recover. English legal literature is not so rich that it can afford to be without contributions such as those contained in this volume. On putting it down one thinks of what we might have gained if B., S., M. and others had shown the same independence and initiative.

From the point of view of Lord Wright's work it is highly significant that he is rather teacher turned judge than author. It is true that if he had not afterwards become a leading counsel he would not have been made a judge, and that his large practice gave him part of the qualifications for eminence as a judge. But his eminence as a lawyer is not unconnected with the thought which he gave to legal problems as a teacher. In this, of course, he is far from being a solitary figure, and one cannot help the reflection that in refusing judicial office to teachers unless and until they have achieved large practices at the bar the Lord Chancellor deprives the community of a valuable source of judicial recruitment. This is one of the principal reasons why the American contribution to the development of the common law has for so long exceeded that made in the land of its birth, a fact to which Lord Wright himself draws attention.

The present volume consists of a number of lectures and book reviews. Most of these were either delivered in the United States, or were contributed to American journals, or are reviews of American books. It is therefore an outstanding contribution to Anglo-American legal friendship. The remainder are addresses to English societies. Such a collection is apt to be uneven in quality, and one or two of these chapters might perhaps have been omitted with advantage to the balance of the volume. At the same time there is hardly one of them which does not contain some passage of profound insight or acute observation. A reader of the chapter on General Aspects of Law, which was prepared for a student society, might well turn to the next, after reading a few pages relating to matters with which he was perfectly familiar. By doing so he would lose the advantage of an interesting and liberal discussion about the relationship of modern administrative law to the common law, in which the author shows, for an English judge, an unusual appreciation of the part played by economic and social forces in the making of the law.

These same ideas are discussed at greater length in the Preface, in some ways the most important part of the volume, for here Lord Wright sets out a sort of *credo*, the *credo* of a liberal judge. Its value above all consists of an exceedingly frank discussion of the process of moulding the law, so as to fit in with the requirements of modern society, a matter of the first importance which no one in authority has previously had the courage to examine in public. Lord Wright, unfortunately as I think, accepts the doctrine of *stare decisis*, and recognises that logical analysis must be the chief working tool of the law. He sees at once, however, the difficulties which these postulates must occasion to a developing system: "I have often wondered how this perpetual process of change can be reconciled with the principle of authority and the rule of *stare decisis*." He then examines the processes by which this problem is more or less solved in practice.

I do not, however, consider that Lord Wright really succeeds in extricating himself from the *stare decisis* dilemma. His entanglement in it explains his passionate endeavours to push ahead the work of the Law Revision Committee. It explains also some of his robust distinguishings of earlier cases. Yet the Law Revision Committee has proved a less flexible and quickly wielded weapon than had been hoped, while the process of valiant distinctions soon leads to a condition of that very uncertainty which the doctrine of *stare decisis* is designed to prevent; since it becomes difficult to forecast which way the Court will jump.

The truth is that precedent was designed as a tool and has become a master. Its proper use is indicated by Lord Wright himself in his discussion of logical analysis, which seems to exercise over many judges just the same sort of fascination as does *stare decisis*. Lord Wright, however, is determined to keep logic in control, as is indeed evident from his own judicial work—"however excellent the logic which has developed the process, the excellence of the logic will not justify the rule if that is based on a fundamental premise which is bad"; the law "will be less concerned with the literal interpretation and reconciliation, in a narrow and technical spirit, of decided cases," are only two of many quotations which could be given.

Lord Wright's examination of the processes by means of which he considers that the above formulated dilemma is solved is of much importance. He finds on the facts of any particular case that there is always,so to speak, a free area where the principles of justice may be applied, though he frankly confesses that he is still looking for a "satisfactory definition of justice." He refers to the "judicial or social intolerance or prejudice out of which so many dogmas and rules originated," and indicates the necessity of reviewing them in the light of "modern conditions of life and thought." This review can go on in the free area just mentioned, thus "without any spectacular reversal a rule of law may gradually, almost insensibly, become substantially changed so as to coincide with the changing needs and temper of the time."

It is in the light of this philosophy that Lord Wright has written most of the chapters in his book. His method is to single out for examination a number of common law doctrines which in his view have militated against the use of the common law as a flexible instrument of social justice. Among these the doctrine of consideration is particularly singled out for attack, more especially in the chapter "Ought the Doctrine of Consideration to be Abolished?" On the other hand, he finds certain common law conceptions to be still in a fluid state, providing principles which in skilled and

sympathetic hands may be used effectively in the progressive struggle; of these quasi-contract and negligence are perhaps the chief. With these three topics Lord Wright is very much concerned, and in a volume made up of disconnected chapters it is only to be expected that there is some overlapping.

The subject of quasi-contract has not been handled in this country with a firmer, or more skilled grasp. The introductory chapter in *Sinclair* v. *Brougham* made a great impression when first published in the Cambridge *Law Journal*. It is followed up by an essay on the American "Restatement of the Law of Restitution" which involves a wider discussion of the same topic. These chapters will be of classical importance to students of this subject. Lord Wright's admiration for the progressive development of the common law in the U.S.A. and in the British Dominions is very evident. He regrets the disappearance of American citations in our courts, and his statement that "it is a commonplace that the United States from very early days were in advance of the English in their legal education and study" comes more unexpectedly from an English judge than it would from a professor.

The important chapter on Public Policy is so full of interesting observations as to provoke a full discussion if space permitted. In a transitional period from *laissez faire* this doctrine gives rise to unusual difficulties both of theory and practice, and it is plain that the Courts have not yet evolved any clear or consistent policy. This is reflected in Lord Wright's treatment of the subject. From time to time it appears that he is subconsciously dominated by *laissez faire* conceptions in which he was presumably educated. His very urgent sense of the social necessities of the times, however, leads him continually away from that position, and there is a conflict which is evident in his treatment of the subject.

The valuable chapter on the Common Law in its Old Home is designed to persuade a perhaps sceptical American legal public that the English common law is capable of expansion and adaptation to new needs, though Lord Wright is not sparing in his criticisms of its weaknesses. On the whole he makes a good case, though it is interesting to notice how precedent crops up as an obstruction. He draws a red herring across this trail by an attack on codification which shows less than his usual insight. He admits that in his own special subject of commercial law codification has worked well, but explains this by saying that this subject was already substantially developed. It would not be difficult to show that many branches of commercial law are in a state of rapid development which is hindered much less by the codes than by the precedents. A properly drafted code need not be a hindrance to progress, for its sections are open to interpretative moulding, as a number of Lord Wright's own decisions indicate.

The chapter on the Study of Law also contains some important observations, none more so than a reflection upon the general attitude of the Courts in the application and construction of social legislation, in which he attacks the well-known rule that a statute should be interpreted so as not to derogate from the common law. One could wish that the judiciary as a whole would take these observations to heart.

Space does not permit of anything more than a catalogue of the remaining chapters which are mostly of more technical interest. They are: the Liesbosch Case, the North Western Utilities Case, Gold Clauses, Judicial Proof (a review of Dean Wigmore's book) Williston on Contracts (a long review containing a number of important observations on general principles

of contract), Some Developments of Commercial Law in the Present Century, and a memorial to Pollock.

I cannot conclude without expressing a word of gratitude to Professor Goodhart and Winfield on whose persuasion Lord Wright consented to republish these chapters. There can be no doubt that they make a real contribution to the common law, and one which could have become familar to few students but for the appearance of this volume.

R. S. T. CHORLEY.

NATIONAL SOVEREIGNTY AND INTERNATIONAL ORDER. By PROF. GEORGE W. KEETON, M.A., LL.D.—**MAKING INTERNATIONAL LAW WORK.** By PROF. GEORGE W. KEETON, M.A., LL.D., and GEORG SCHWARZENBERGER, Ph.D., Dr. Jur. Peace Book Company (London), Ltd.

C'est avec un vif intérêt et un immense plaisir intellectuel que nous avons lu et parfois relu les deux ouvrages de synthèse du Professeur Keeton et du Dr. Schwarzenberger. Sous un volume restreint, et sous une forme aisément accessible à des non spécialistes, ils réalisent un effort jusqu'ici inégalé pour secouer les préjugés politiques ancestraux et guider les esprits vers une meilleure compréhension de l'organisation nécessaire des rapports internationaux. Il faut en admirer la sûre ordonnance de pensée et la systématisation scientifique des développements. Pour bien les comprendre il faut les réunir comme s'il s'agissait d'un seul ouvrage, car ils se développent et complètent l'un l'autre. Nous les examinerons donc concurremment.[1]

1. Le conflit des souverainetés nationales et de l'ordre juridique international peut être considéré comme la base même de l'exposé antithétique de nos deux auteurs. *National Sov.* prend comme point de départ la faillite de la S.D.N. après 1935, succédant à celle du Droit international classique en 1914. Il en analyse les raisons: l'imbrication politique du Pacte avec les traités de paix; la constitution à Genève d'une Ligue de gouvernements et non d'une Société de peuples; l'absence de tout système effectif de revision pacifique; l'absence de toute tentative d'organisation économique. Aussi la S.D.N. a-t-elle manqué ses trois buts: le réglement des conflits, l'établissement de la sécurité collective par les sanctions, le désarmement. La raison essentielle de cette faillite, c'est la persistance et la virulence du principe de souveraineté, à Genève même. (V. le développement au chap. VII et VIII de *Making Int.*)

2. Cependant cette conception anarchique d'une société d'Etats souverains n'a pas toujours existé. Les origines de la notion sont précisées et décrites au Chapitre 1er de *Making Int.* où l'on voit que c'est une notion politique relativement récente née au XVIième siècle, en même temps que les grands Etats modernes, sur les ruines de la Société féodale. Grotius en fut le théoricien; toute son œuvre est la synthèse du Droit naturel préexistant et du positivisme juridique. Nos auteurs nous retracent les différents stades du développement du Droit international classique à travers les études de Machiavel et de Gentili, les horreurs de la guerre de Trente Ans, le statut des traités de Westphalie, la conception du Léviatan de Hobbes et les doctrines absolutistes d'Austin, jusqu'à la conception de l'Etat totalitaire qui n'en est en somme que l'abou-

[1] Nous désignerons le premier de ces ouvrages par *National Sov.* et le second par *Making Int.*

tissement exaspéré. Cette évolution aboutit au formalisme improductif de la doctrine classique, à la disparition de l'individu comme sujet de droit, à la fiction de la personnalité souveraine de l'Etat qui réduit le Droit international à n'être qu'une sorte de morale conventionnelle incapable d'opérer ailleurs que dans un milieu social de statisme et d'équilibre. L'affaiblissement progressif des normes de base telles que le respect des traités, même imposés par la force;—le *deadlock* de la *clausula Rebus sic stantibus*;—le droit de se faire justice à soi-même, tout cela implique la nécessité d'une rénovation totale d'un système entièrement inconciliable avec tout ordre juridique.

On retrouve le développement de ces idées dans le *Making Int.* (Chap. II et III) où après avoir analysé le milieu social et diplomatique dans lequel s'est développé le Droit international, les auteurs décrivent son utilisation par les gouvernements et constatent qu'il a pu souvent servir de prétexte ou d'excuse aux abus du pouvoir politique. L'insuffisance des conceptions de moralité internationale en tant que succédané du Droit fait l'objet du Chapitre V.

3. Il y a eu pourtant de nombreux et continuels efforts d'organisation internationale (*National Sov.*, Chap. III; *Making Int.*, Chap. VI, VII VIII). Nous rencontrons ici une brève description des projets historiques des Princes, de l'œuvre des Congrès, des premiers organismes administratifs internationaux, de l'arbitrage et de la juridiction, et, finalement, des institutions de la S.D.N. avec son organisation sanctionnatrice et la suppression de la compétence de guerre par le Pacte Kellogg. Les problèmes de structure sont ici clairement posés et débattus, notamment le problème de l'universalité sous ses différents aspects subtilement décrits, la procédure de règlement des conflits et de la sécurité collective. Les insuffisances de cette structure sont mises à nu pour montrer comment le Covenant s'est trouvé revisé *en fait* par un retour aux compétitions de la puissance politique et par la diplomatie des gouvernements venus à Genève pour se servir de la Ligue bien plus que pour la servir et accomplir ses finalités (Chap. IX du *Making Int.*, Chap. V et VI du *National Sov.*) Un historique à la fois complet et succinct des principaux conflits portés devant la Ligue présente en abrégé toute l'histoire politique de Genève.

4. La cause essentielle de la faillite de cet effort nous est donnée au Chap. VII du *Making Int.* En vingt pages environ (ce qui constitue un tour de force didactique,) nous assistons à la dissection de la notion de souveraineté et à une analyse aigue des doctrines modernes dissidentes: celle de Kelsen avec sa conception pure du Droit; celle de Jellinek ou de l'auto-limitation; celle de Duguit ou de la sociologie réaliste; celle de Laski ou du pluralisme, pour aboutir à la démonstration de la supériorité de l'intérêt général de la communauté internationale sur les finalités exclusivistes des Etats. De frappantes citations des résolutions du Synode des Eglises de Juin 1938, des déclarations de l'Archevêque d'York et de Lord Lothian illustrent cette thèse. Le Chapitre II du *Making Int.* pousse l'exposé de la politique européenne et de son opposition avec le Commonwealth international jusqu'au drame de Munich.

La théorie des remèdes constructifs à cette anarchie des souverainetés se trouve dans l'exposé du fédéralisme (Chap. VIII, IX et X du *National Sov.* et Chap. X du *Making Int.*). Le British Commonwealth ne peut servir de modèle à la construction internationale. Sa constitution est spéciale à des communautés dont les affinités et les tendances sont trop nettement particulières. Il y a toute la différence entre le British Commonwealth et le

fédéralisme, qui distingue une organisation familiale d'une association d'étrangers. Cependant la communauté internationale est une réalité existante. Elle est fondée sur une solidarité matérielle que les progrès techniques et les idéologies risquent peut être de désorganiser, mais qui peut se rétablir si certaines conditions essentielles sont respectées. Quelles conditions? D'abord l'abandon du droit de se faire justice c'est-à-dire la renonciation à la guerre et le recours aux seuls moyens pacifiques de solution des conflits. Ensuite l'établissement de sanctions et d'une police internationale. C'est en effet une plaisanterie que de vouloir assimiler la police à la guerre et de croire que l'usage de la force est toujours condamnable. C'est une doctrine d'anarchie. Enfin, troisième condition, l'institution d'un mécanisme souple de revision, car tous les conflits ne sont pas résolubles sur la base du Droit; les plus graves sont précisément ceux qui ne peuvent être résolus que par une modification de la règle de Droit ou des situations juridiques acquises.

Ces bases du fédéralisme, ou même de toute organisation de l'ordre mondial, sont en effet les seules qui puissent donner des résultats effectifs. Nos auteurs se rencontrent ici avec des études de Friedman, dans le *British Year Book* et la MODERN LAW REVIEW, avec les conclusions de Sir John Fisher Williams, de Philippe Noel Baker, de Lord Davies, de Manning, Mitrany, Mousley et tant d'autres que l'on pourrait citer et qui enseignent que la conception mythique d'une société d'Etats souverains est une *contradiction in terminis*. On ne fait pas des "sujets de Droit" avec des entités *lege solutae*. C'est aussi la thèse que nous avons toujours défendée, notamment dans nos "Principes et systématique du Droit des Gens".

5. Je voudrais dire ici également mon accord du point de vue pratique avec la thèse de nos auteurs sur la nécessité de procéder *par degrés* à l'organisation de la communauté internationale. La thèse de l'universalité indifférenciée a fait ses preuves et elles sont négatives (Chap. X du *Making Int.* et du *National Sov.*). Le régime fédéral ne peut s'établir que sur des bases multiples, régionalement construites et servant de colonnes à l'édifice futur d'un fédéralisme généralisé. Il ne peut y avoir de "*constitution collective*" qu'entre Nations présentant un degré avancé d'homogénéité, soit en ce qui concerne les institutions politiques et sociales, soit surtout en ce qui concerne la mentalité juridique et la philosophie politique (*Weltanschauung*). Toute tentative de fédéralisme trop étendu et disparate est condamnée à de nouveaux échecs, peut être catastrophiques, pour l'avenir de l'ordre mondial. Sans doute deviendra-t-il possible de superposer à ces fédéralismes primaires et limités des organismes plus larges continentaux ou même universels. Mais ceux-ci, pour le moment, ne peuvent se concevoir que sur le plan d'accords conventionnels de nature économique plutôt que politique et non sur la base d'institutions représentatives à pouvoirs déterminateurs et à décisions majoritaires. Ces institutions super-étatiques ne se conçoivent encore que pour des groupes d'Etats très homogènes et étroitement apparentés. C'est de ces derniers que doit partir l'influence et l'action pour un élargissement progressif du fédéralisme par des stratifications successives aboutissant au World Order. Nous avons en France un vieux proverbe qui traduit bien ma pensée: "Qui trop embrasse mal étreint". C'est l'expression vulgarisée d'une méthode scientifique; elle convient exactement aux deux livres que nous avons analysés, car ils ne se départissent à aucun moment de cette méthode d'observation scientifique.

GEORGES SCELLE,
Professeur à la Faculté de Droit de Paris.

THE MACHINERY OF JUSTICE IN ENGLAND. By R. M. Jackson. Pp. viii + 342. Cambridge, at the University Press. **16s.** net.

It is strange that we should have had to wait for so long for this book, and perhaps unexpected that when it has at last appeared it should be so good. The task of giving a lucid account of that curious patched up clanking apparatus by means of which quite good if devilishly expensive justice is administered in England, and, what is more, giving it in sufficient detail to present a scholarly picture without descending to a minute description of each gudgeon pin is no light one, and Dr. Jackson has discharged it admirably. We reviewed some time ago a smaller volume entitled *Justice in England*, which covered a good deal of the same ground in a more journalistic and superficial manner (see 2 *Mod. L. Rev.*, 251). Good as it was in some ways that book was marred by bias and exaggeration. It had, however, the valuable quality of giving a pretty accurate description of the machinery which it criticised. Dr. Jackson's work is much more balanced and objective, his description is more detailed and comprehensive, and he provides a running comment of criticism and appraisal which is at once searching and fair. It is very unusual in this country, and indeed we believe elsewhere, to get a book which combines accurate description of a legal institution with informed criticism and appraisal. This is very unfortunate, for since teachers do not usually make good the deficiency, it results in students but seldom taking away with them from their Law Schools any sort of dynamic conception of the law which they are going out into the world to administer. This is perhaps particularly important as regards the machinery of justice, for the institutions which function here, such as the jury and the judiciary, are held in such unreasoning veneration that the average author contents himself with a few vain and superlative repetitions of a laudatory character before proceeding to his task of description. Dr. Jackson certainly does not err in this direction and the young lawyer starting to commence his life work in the jungle of legal practice under the influence of this teaching will neither have to maintain illusions by an ostrich-like imperviousness to the facts, such as is natural to high legal luminaries when orating at Guildhall banquets, nor to become a complete cynic; for he will already have a shrewd idea of what he is in for.

This book ought certainly to be read by every student, we had almost said at the outset of his studies, for one of the great difficulties of boys who have just left school in making their first acquaintance with the law is to get a background for their reading. This has been realised of recent years in several universities with the result that such subjects as the English Legal System have appeared in their curricula. As Dr. Jackson acutely observes, however, the value of this new departure has largely been bogged in the swamps of mediæval history, a mistake which he himself is careful to avoid. For a first year student this book contains too much detail and perhaps assumes a wider acquaintance with the world of law than he is likely to have. Used, however, in conjunction with a good course of lectures it should be invaluable. The same reasons may make it rather difficult reading for the layman, but he will certainly find it worth his while, and no reasonably well educated man should find it beyond him. Moreover, no man should consider himself properly educated without some acquaintance with most of the contents of this volume. Dr. Jackson's workmanlike style should be of assistance, though there are some instances

of rather hurried writing. He also has a mordant humour which enlivens the reader's path and gives him many a quiet chuckle (*cf.* pp. 24, 230, etc.).

The historical introduction, which is concerned with the Courts and the common law, is limited to twenty pages, which is really erring on the opposite side to the mistake noted above, and involves, for example, the omission of any reference to Bentham in connection with the County Court system. This is followed by a lucid description of the Courts both civil and criminal (ch. II and III). It is typical of Dr. Jackson's method that he refers to and discusses the recent proposals for the reorganisation of the High Court. This chapter contains sections on the mode of trial, upon execution, and upon arbitration. Curiously enough, in the succinct passage on procedure there is no reference to the important order for directions.

The chapter on criminal jurisdiction, one of the best in the book, has a wide scope and deals not only with the process of prosecuting and defending criminals, but contains sections on juvenile courts, the probation service, and the technique of sentencing, a section in which the author makes some particularly sound observations.

Next to be dealt with is the Personnel of the Law, in which are discussed fusion, the judiciary and the jury system, among other topics. Some of the criticisms of both the latter institutions are very pertinent and have wanted saying for a long time. The jury system has, of course, recently been fair game for everybody with the result that its undoubted advantages are being overlooked, and in civil cases it is rapidly becoming an institution of the past. The judiciary in the twentieth century has become altogether too sacrosanct, and it is refreshing to find an author who has the courage to assess the work of judges as if they were human beings and not demi-gods. The section in this chapter on Court Officials needs rewriting. It would hardly convey a clear picture of who they are or what they do to anyone quite unfamiliar with the subject.

The chapter on costs contains a section on the Poor Persons Rules. There is also a chapter on administrative law written with a broad appreciation of the modern social needs which have necessitated the re-creation of this branch of the law—not that it ever really went out of existence. Both these chapters are full of horse-sense, and might be read with much profit by many narrow-minded practitioners, as indeed might the whole volume.

It will have been gathered from what has already been said that Dr. Jackson approaches his subject with an eye to bringing up to date a great part of the machinery which he describes. In his final chapter on "The Outlook for Reform" he deals more particularly with the machinery by means of which the reforms which he has indicated as necessary may be brought about. He marshalls the arguments for a Ministry of Justice in a most convincing manner, and provides what may well become a classical statement of the case in favour of this very necessary institution. Considering how many eminent men from Lords Langdale and Brougham to Lords Bryce and Haldane have advocated the setting up of such a ministry the literature on the subject is curiously scanty.

In the final section of this chapter a thoroughgoing scheme for the reorganisation of the Courts system is put forward. Parts of it seem open to criticism, but as Dr. Jackson says, they are intended principally as a basis for discussion. He is certainly right in his contention, that the great enemies are complacency and self-satisfaction in the legal profession. Perhaps there is still time for us to put our house in order. If we do not do

so there is grave danger that it may be brought down about our ears, and the stones whereof it was built cast forth into the outer darkness.

R. S. T. CHORLEY.

LA CRISE MODERNE DU DROIT PÉNAL. La Politique criminelle des États autoritaires. Par H. DONNEDIEU DE VABRES. Librairie du Recueil Sirey, Paris, 1938. Pp. 223.

It is a somewhat saddening experience to read this brave attempt of a great French scholar to present impartially totalitarian achievements in the field of criminal law which must be so utterly foreign to his own way of thinking. Accurate and reliable in detail as Professor Donnedieu de Vabres' account of Fascist, National-Socialist, and Bolshevist penal policy is, it can nevertheless hardly be denied that in his desire to be fair he has sometimes hesitated to call a spade a spade and failed to see things in their right perspective. In our rapidly changing world it is necessary to mention that the book, though published at the end of 1938, is actually based on a course of lectures delivered in November, 1937, at the Syrian University of Damascus.

In the first few years of the Nazi regime, people living outside the Reich and insufficiently conversant with the new spirit might perhaps have been forgiven for not losing entirely the hope that out of this earthquake something of value to mankind in general and the treatment of crime in particular might emerge. The proceedings of the International Penal and Penitentiary Congress in Berlin, 1935, not to mention subsequent events, should, it is true, have finally disillusioned even the most optimistic of foreign criminal lawyers. The author records with satisfaction the friendly reception he had as a lecturer before the Academy of German Law in spite of the somewhat uncompromising contents of his paper. But did he not shut his eyes to the fact that this attitude was due not to any genuine desire to understand his point of view, but simply in pursuance of a policy prescribed from above? Similarly, in his discussion of the general conceptions of Nazi criminal law, the author is somewhat inclined to be unduly impressed by certain theoretical quibbles and arguments produced by Nazi writers. He does not fail to recognise, however, that for the study of things as they really are this part of the system (which he aptly calls "la pars translaticia") is only of minor interest (p. 113). It matters, in fact, not at all whether the Commission for the drafting of the Nazi Penal Code or the Academy of German Law or individual writers may have adopted or recommended this or that definition or formula: any conceivable phrase would be interpreted solely in the Nazi spirit. The one thing we miss in this volume is a reminder such, for instance, as that made some years ago in this Journal by a writer on "Theories of Law and Justice of Fascist Italy"[1]: "This article . . . is not concerned with the divergence between what they *do* and what they *profess*. . . ."

For each of the three totalitarian systems, and in particular for Germany and Italy, the author gives an admirable survey of their historical origin and spiritual ancestors. He rightly denounces Gobineau, Nietzsche, and now Rosenberg as the chief inspirers of the Nazi system. How much this is true can sometimes be proved even down to details from recent Nazi writings where attempts are made to justify penal methods

[1] Mr. Julius Stone, *Modern Law Review*, December, 1937, p. 178.

such as castration by quotations from Nietzsche. On the other hand, Rosenberg's theory that elimination and selection, not vengeance and retribution, should be the exclusive objects of punishment (p. 89) has not been accepted by the official doctrine which rather favours a mixture of all these aims. It is only here and there that the more practical criminological and penological aspects are touched upon by the author. Neither the work of the Boards for crimino-biological examinations nor the details of prison administration in Nazi Germany are discussed. To say that the Regulations of January 22, 1937, concerning juvenile prisons are "inspired by the example of Borstal" (p. 104) seems rather misleading, considering the fact, for instance, that these Regulations admit continuous solitary confinement up to three months and, with the medical officer's consent, even for an unlimited period (§21). Among other fundamental aspects which might well have been discussed in order to show things in their right proportion is the network of amnesties which have been used by the Nazis to place their party members and friends outside the scope of the penal law and to keep the official figures of Criminal Statistics down.

The ideological differences between the Nazi and the Fascist systems are set out with great clarity: The former is based upon the "People" (for this reason, the author calls the system "un droit penal populaire," which seems somewhat misleading) and it centres round the Führerprinzip and the "sound views of the German people," whilst the latter devotes itself to the protection of the State and the family (pp. 11, 35, 129–30). It is the Bolshevist penal policy which seems to offer the greatest difficulties to the author. He regards it as something mysterious, like the German, and its aims, too, seem to be elimination and selection. But there, the author thinks, the similarities end. He lays particular stress, for instance, on the fact that analogy is, in his view, admitted on a much wider scale in Russian than in German law (p. 159). Granted certain theoretical differences, we are nevertheless inclined to say that this means overstressing the significance of the printed formula at the expense of the spirit. As with most of us, the author is handicapped by the necessity of having to rely upon second-hand information for his criticism of the Russian system, and the fact that his sources are, for the greater part, violently anti-Bolshevist German and Italian writers did (before 1939!) hardly improve their reliability. With this exception, the author's profound knowledge of the subject deserves every praise, and even minor mistakes, almost inevitable in a book on comparative law, are very rare indeed. (The first Prussian Minister of Justice under the Nazi regime was not "Dr. Karl," p. 90, but a former bailiff called Kerrl and definitely one of the few people over 21 in Germany without a Doctor. Outlawry means in German either "Aechtung" or "Acht," whilst "Achtung," pp. 81, 125, means respect or reputation.)

In a concluding chapter of great interest the author at last ventures some plain speaking, but, alas, from his indictment of the totalitarian systems he soon passes to a vigorous denunciation of his own country. According to him, there has been a certain stagnation (he even says "artério-sclérose") in French penal methods for the last twenty-five years. It is not for us to decide how far this criticism is justified. What must, however, be distinctly rejected is the author's tendency to lay the blame entirely at the door of democracy as such and to credit the authoritarian countries with "vigueur juvénile" and similar virtues. "Réalisme,

solidarisme, sévérité" are the lessons we ought to learn from them. It would be beyond the scope of this review to point out in detail that these alleged merits have in no way brought about a decline in crime in the totalitarian States. On the other hand, the author's view that the democracies, in spite of their "potentiel supérieur," have failed to adapt their penal methods to the fundamental social and economic changes of our time would perhaps not have been thus generalised had he paid greater attention to the progress made in certain democracies in the matter of penal reform.

H. MANNHEIM.

LATEY'S LAW AND PRACTICE IN DIVORCE AND MATRIMONIAL CAUSES. By WILLIAM LATEY and D. PERRONET REES. Sweet & Maxwell, 1940. Pp. xciv and 1279. **63s.** net.

In this, the twelth edition of one of the two standard works on divorce, long familiar under another name, the authors were confronted with the difficult task of grafting the extensive changes made by the Matrimonial Causes Act, 1937, on to the existing law and practice of the Division, which was already of considerable bulk. It was inevitable therefore that the new edition should be larger than the previous one, and it is so by nearly two hundred pages, although some of the older cases could have been omitted. The book could have been further shortened if the authors had contented themselves in the second part dealing with practice, with reference to the appropriate page of the first part, which deals with the law, instead of repeating, sometimes almost in extenso, matters that have already been adequately discussed.

All the new grounds of relief are fully considered and where reported authority is scanty much helpful material is adduced from unreported cases at Assizes and extra-judicial example, as at pp. 64–65, and p. 365. Desertion gets a chapter to itself, in which all the authorities are noted and discussed. (Incidentally, the discussion at pp. 111–13 on the effect of a previous petition in terminating the period of desertion can now be shortened after the recent decision of the Lords in *Cohen* v. *Cohen* (1939), 2 All. E.R. 331, overruling *Stevenson* v. *Stevenson* (1911), p. 191; the cases cited in these pages illustrate the difficulties that arise from laying down a rigid rule, as the Stevenson case did, in anything so "human," as matrimonial relations.) One's comment is that, while the effect of the cases is well stated, it is all done rather uncritically with little comment on some of the more difficult cases: the authors no doubt would reply that in a book written essentially for practioners and covering so wide a field, nothing more is possible.

The same comment applies to the chapters on domicil and the Conflict of Matrimonial Laws: no important point is missed, but the reader who is unacquainted with private international law would not gather from these chapters that the subject is one of most eagerly debated ones in English law; or that assumptions that are here almost taken for granted (as in the section on Renvoi) are hotly contested by other writers. References to Dr. Cheshire's book would improve this section.

The authors point out that in the last generation the change in the attitude of society to matrimonial relations and the improvement in the wife's status amounts to a social revolution; and that the revolution is strongly reflected in recent decisions; especially is this so in those cases where the Court has to exercise a discretionary power, e.g. in cases where

the petitioner is guilty of adultery or there has been undue delay. The modern tendency is to recognise "the undesirability of maintaining the marriage tie where there was no possibility of the married couple living together again." Thus the authors are able to cite numerous old cases where decrees were refused in circumstances that would certainly be accepted as extenuating today. Similarly, the legal definition of cruelty, which the Ecclesiastical Courts limited to cases of violence or actual threats, have been extended to include any form of ill-treatment and even "moral" cruelty. Again, the rule that a guilty wife should not have access to the children of the marriage has been relaxed so as to remove its punitive basis; and the rules as to damages against a co-respondent have been modified. All these changes, significantly enough, date from the war of 1914–18; and the bare legal record, revealed by the authorities, is a document of great social interest.

In passing it may be said that the differences between a void and voidable marriage, which are considerable and not yet fully worked out, might have been more fully discussed. Also, the effect of a conviction for bigamy on a petition based on adultery is not made clear at p. 508. The rule appears to be that a conviction for bigamy does not *per se* raise any presumption of adultery, which must be strictly proved in this meticulous division; the effect of *Ellam* v. *Ellam* and *Bonaparte* v. *Bonaparte* is misstated in the text at p. 75. Lastly, some of the precedents are a little verbose; a pleading should be as brief as possible. But the work covers every topic arising out of matrimonial causes; it collects together over 250 pages of statutes and orders; it deals fully with the practical as well as the legal aspect of every point; and concludes with a comprehensive index. This edition cannot fail to enhance the reputation of its predecessors.[1]

G. A. FORREST.

LIMITATION OF ACTIONS. By C. H. S. PRESTON & G. H. NEWSOM. lviii and 480 pp. The Solicitors' Law Stationery Society Ltd. 1940. **32s. 6d.** net.

Reviewed on p. 46.

[1] There are a few printing errors in the text; e.g., at p. 366 "child" should be "husband" and at p. 551 "form" should be "for."